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24 Cal.App.2d 382

MITCHELL et al. v. SHORERIDGE OIL CO. et al.

Civ. 1668.

Supreme Court of California.

March 14, 1938.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

On petition for hearing.

Prior opinion, 75 P.2d 110.

Raphael Dechter, of Los Angeles, for appellants.

Jesse R. Shafer, of Los Angeles, for respondent.

PER CURIAM.

The petition for hearing is denied. However, we withhold approval from that portion of the opinion beginning with the word, "Finally," found in the next to the last paragraph of the opinion, and ending with the citation, "California Nat. Supply Co. v. Porter, 83 Cal.App. 758, 763, 257 P. 161."

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11 Cal.2d 14

In re IRONS.

L. A. 16417.

Supreme Court of California.

March 15, 1938.

Attorney and client 🔑58

Where an attorney, after collecting money in satisfaction of a judgment, falsely told client that he had not been paid because of an appeal but paid client after client discovered falsehood, without knowledge that client had reported matter to the State Bar, suspension from practice of law for 18 months was proper. Code Civ.Proc. § 287, subd. 5.

◆

In Bank.

Proceeding in the matter of William Henry Irons to review the recommendation by the Board of Governors of the State Bar of petitioner's suspension from the practice of law for eighteen months.

Recommendation approved and adopted.

William H. Irons, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

By this proceeding, a review is sought of the recommendation by the board of governors of the State Bar, of petitioner's suspension for a period of eighteen months from the practice of the law within this state.

By the terms of the notice that was given to petitioner to show cause why he "should not be disciplined for professional misconduct," in substance, the ultimate facts which purportedly constituted such asserted misconduct were set forth, together with the allegation that: "All of said acts so committed by you during the course of your relations as an attorney and counsellor at law involve moral turpitude and dishonesty within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure."

On the part of the prosecution, briefly, the record establishes the existence of the following facts: In satisfaction of a judgment in an action in which petitioner had represented one Lampe, petitioner was paid the sum of $250, of which amount, in accordance with an agreement between him and his client, petitioner was entitled to retain for his own use the sum of $83.33. Instead of paying to his client the remainder of the amount thus collected, by means of false and misleading statements made by petitioner to his client, he "stalled" for a period of five months, at the expiration of which time he was informed by his client that he knew of petitioner's deception in the matter. Within a few days thereafter, petitioner paid to his client the amount to which he was entitled. In the meantime, the client had entered complaint of petitioner's misconduct to the proper officials who represented the State Bar of California, with the result that about a month after petitioner had paid his client, he was served with the said notice to show cause why he should not be disciplined. At the time when petitioner paid the money to Lampe, petitioner had no knowledge that Lampe had complained of petitioner's misconduct in the premises.

On the hearing of the notice to show cause, although petitioner admitted the truth of the foregoing statement, his defense thereto consisted of testimony given by him, which in part was corroborated by his law partner, to the effect that on the date when he received the said sum of $250, he deducted his fee therefrom and then placed the balance thereof in an envelope which he gave to his law partner, with the understanding then had between them that on the evening of that day he would deliver the envelope and the money to petitioner's client; that the next day at about 3:30 o'clock p. m., for the asserted reason that he had been unable to find his client, his partner returned the envelope to petitioner. Without any corroboration thereof, petitioner also testified that upon receipt of the envelope from his partner he had placed the envelope in a drawer in his roll-top desk, which he believed he thereupon locked; that petitioner had been engaged in court all of that day, but that on the day following, when he looked for the money that should have been in the envelope, he discovered the fact that some one had taken it; that he registered no complaint with the police department regarding such theft; neither did he report to his client the fact that the money had been stolen. To the contrary, for the reason, as testified by him, that: "I was confident that he wouldn't believe it, that somebody had gone south with his money, and I think my opinions in that regard have been substantiated because other men more intelligent than Lampe believed that and don't believe it now. I was simply stalling for time for the purpose of getting the money, and at that time I had an opinion as to where the money had gone, and I am still of the same opinion."

Instead of telling his client that which petitioner now asserts was the truth regarding the disappearance of the money, the record indisputably shows that on several occasions, during a period of some months next ensuing, he represented to Lampe that due to the fact that the defendant had taken an appeal from the judgment the money had not been collected; that upon one of these occasions petitioner stated to Lampe that the "opposite side" had appealed and that "the other side" was entitled to thirty days in which to perfect such appeal, which period of time would be followed by a thirty or forty-day period to be accorded Lampe for his "answering" papers upon appeal, and thereafter "they" would be given sixty days for "their (defendant's) final appeal." About four months after petitioner had received the money from defendant's attorney (in carrying out the fiction of an appeal by defendant), in substance, petitioner stated to Lampe that the defendant had not prevailed upon his appeal from the judgment, but that additional time would be required during which certain formalities in regard to court procedure would have to be complied with; that petitioner would have to file certain papers in court after they had been "sent down on appeal"; and that a few days thereafter Lampe would get his money. However, because of some asserted error in those "papers," represented by petitioner to Lampe to have occurred, and the consequent delay in their transmission from the appellate court, petitioner thus acquired a few more days' additional time in which to account for the money which theretofore had been received by him. Thereupon Lampe apparently became suspicious of the representations made by petitioner to him, and began an investigation relative to the asserted appeal. About two months thereafter, with the assistance of another attorney, he examined the records of the court in which the action was brought and therefrom ascertained the fact that not only had no appeal ever been taken, but that the judgment had been satisfied several months previously. Thereafter, upon being advised by Lampe of the latter's knowledge of petitioner's deception, in effect, petitioner stated that he was sorry he had had to "string (Lampe) along," but that he was having some trouble with his law partner in the matter of the collection of fees belonging to petitioner, and that petitioner did not have the cash to pay Lampe then, but would have to "raise the money." He further stated that previously he had given the money due Lampe to his partner to deliver to Lampe, but that his partner thereafter stated to petitioner that he had used it for his own purposes, and that he would repay petitioner, and the latter could in turn "give it back to" Lampe. In that regard Lampe testified that petitioner stated he had made the statements to him regarding the defendant's purported appeal because petitioner "had to have some excuses to raise this money."

In substance, the local administrative committee, before which the proceeding against petitioner was heard, found against the truth of the several statements that had been made by him and in his behalf, and thereupon made its recommendation to the board of governors of the State Bar, that because of the "professional misconduct" of petitioner as an attorney at law, he be suspended from the practice of law within this state for a period of eighteen months; in which conclusion, on a review of the record of the proceedings therein, together with an additional affidavit which was made by the partner of petitioner in his behalf, with the exception of one member thereof, the board of governors of the State Bar concurred, with the additional exception that two of the members of such board were of the opinion that instead of an eighteen months' suspension, petitioner should be disbarred.

Notwithstanding the fact that in effect petitioner admits the truth of each of the incriminatory facts to which reference hereinbefore has been had, petitioner seeks favorable action by this court in his behalf, upon the asserted grounds that the board of governors of the State Bar "acted arbitrarily and in excess of its jurisdiction in that it concurred in the findings, conclusions and recommendations of the Local Administrative Committee and based its recommendations to this Court thereon and upon the minutes and record of the hearing before said Board of Governors on May 14th, 1937; that the findings, conclusions and recommendations of said Administrative Committee and the concurrence therein by and the recommendations of said Board of Governors, were not based upon evidence adduced before said Committee or before said Board of Governors."

Particularly, petitioner asserts that there was an entire lack of evidence to support the conclusion that petitioner had converted to his own use the funds of the complaining witness. In that regard, his argument is to the effect that his own testimony, together with that of his partner, established the truth of the asserted fact that someone stole the money that belonged to his client. But on consideration of all the evidence, the weakness of petitioner's story and its improbability seem so apparent that to comment upon it would appear unnecessary. However, it may be pointed out that the testimony which was given by the partner of petitioner went only to a corroboration of the fact that in the first instance, after petitioner had received the money and had deducted his rightful fee therefrom, an attempt was made by petitioner to pay the balance thereof to his client, and that having been unsuccessful in that regard, the money was returned to petitioner. After that incident, the incriminatory facts are all against petitioner's contention. For example: Petitioner's statement that he placed the money in his roll-top desk was not corroborated. He never informed the police department of the asserted fact that the money had been stolen; nor, with the exception of his partner, his brother, and his secretary, did he ever tell anyone that he had sustained such a loss. And in the latter connection, on the hearing which took place before the local administrative committee, he failed to present any corroborative evidence or testimony that (with the exception of his partner) he had ever informed either of the other persons that the money had been stolen. Although petitioner suspected some mysterious individual as the culprit, he declined to give his name. Even in order to clear his own good name in the premises, as far as his client was concerned, petitioner never at any time made any representation to him that the money had been stolen. From the beginning, petitioner deliberately resorted to the most flagrant falsehoods and deception of the worst type to "stall off" his client's demands that he be paid the money to which he was entitled. Even assuming the truth of the story that was told by petitioner, it is significant that at no time during a period of five months which succeeded the receipt of the money did petitioner pay his client either the whole or any part of the money. It was only after petitioner had been informed by his client that he had obtained conclusive evidence of the deception, that petitioner had practiced, that petitioner paid his client the greater part of the money which theretofore should have been placed in his hands. Nor does the record contain any evidence that before petitioner had been confronted by his client and had been charged with "professional misconduct," did he make even the slightest effort to replace the money which he now asserts had been stolen from him. When petitioner did pay the money to his client, he had no knowledge that his client theretofore had lodged a complaint against him with the local administrative committee of the State Bar.

From the foregoing, it is clear that petitioner's contentions are wholly without merit other than petitioner's unsupported statement to the effect that his client's money had been stolen, with the exception of the testimony that was given by petitioner's partner, to which reference hereinbefore has been had, every other bit of evidence points almost beyond the possibility of doubt, to the conclusion that petitioner willfully and wrongfully misappropriated money that was the property of his client.

In the circumstances, the recommendation of eighteen months' suspension of petitioner from the practice of the law within this state, which was made by the local administrative committee, and in which recommendation the board of governors of the State Bar concurred, was most lenient.

It is ordered that petitioner be and he is denied any relief from the recommendation of which he complains; to the contrary, it is ordered that the said recommendation be and it is approved and adopted. It is further ordered that the license of William Henry Irons to practice law within this state, and in each and all of the courts thereof be, and it is, suspended for a period of eighteen months, effective thirty days after the filing of this order.

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25 Cal.App.2d 342

RYAN v. BURK et al.

Civ. 1863.

District Court of Appeal, Fourth District, California.

March 15, 1938.

1. Schools and school districts ⚷133

The employment of a teacher who requested and was granted a year's leave of absence by school board, and who resumed duties the ensuing year under authority of a resolution of the board retaining the "present staff of teachers," was not terminated by the leave, but continued during the period, although salary was suspended, as respects tenure. St.1927, p. 1913.

2. Evidence ⚷158(15)

Matters omitted from the records of an administrative board can be proved by evidence unless the law expressly requires such matter to appear of record and makes the record the only evidence thereof.

3. Evidence ⚷158(15)

In proceeding to compel reinstatement of teacher in accordance with her seniority rights, oral testimony was admissible to show that teacher had been granted leave of absence during year in which she did not teach for purpose of establishing that there had been no lapse in the period of her employment, in absence of record thereof in the minutes of the school board. St.1927, p. 1913.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Proceeding by Luella Ryan against D. L. Burk and others, as members of the Board of Trustees of Orange Cove Joint Union School District, located partly in the County of Fresno and partly in the County of Tulare, State of California, to compel reinstatement of petitioner as a teacher. Judgment for petitioner, and the trustees appeal.

Affirmed.

Dan F. Conway, Dist. Atty., W. C. Tupper, Asst. Dist. Atty., and Henry A. Hunter, Deputy Dist. Atty., all of Fresno, for appellants.

Shepard & Shepard, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal by the trustees of a school district from a judgment in favor of the petitioner and respondent directing the issuance of a writ of mandate requiring the appellants to reinstate the respondent as a teacher in the school maintained in said district and to pay her salary from September 1, 1936.

The respondent taught continuously in said district from 1920 until the end of the school year 1935-1936, except for the year 1926-1927. In April, 1926, she applied through the principal of the school for a leave of absence for the next school year and a Mrs. Magnuson was recommended to take her place for that year. The minutes of the board show nothing with respect to the granting of this leave of absence, but the respondent did not teach during the next year and Mrs. Magnuson did. This school had less than eight teachers and permanent tenure of such teachers was not provided for until August 1, 1927 (Stats. 1927, p. 1913). The respondent returned to her work at the opening of the school year 1927-1928 and taught continuously until the end of the school year 1935-1936. In the spring of 1936 the board of trustees determined that the teaching staff of this school must be diminished because of a decrease in attendance and notified the respondent that her services would no longer be required. She demanded that she be retained on the ground that she had seniority rights and presented herself and offered to teach on the opening of the year 1936-1937. She was not allowed to teach and this action followed.

It is admitted that all teachers in this school had permanent status when these events took place in 1936 and that the respondent was the oldest teacher in point of service unless this service was broken by her absence during the year 1926-1927. Appellants take the position that a leave of absence for that year was not legally granted, that the respondent was merely reemployed when she returned the next year, and that her continuous employment dates from that time, making her the youngest teacher in point of service. They contend that the evidence discloses that there was merely a verbal understanding that if the respondent returned after the year 1926-1927 she would again be elected as a teacher in said district, that during that year there was no relationship of employer and employee between her and the district, and that the evidence is, therefore, insufficient to sustain the judgment.

The evidence shows something more than a mere understanding that the services of the respondent as a teacher were being terminated at the end of the school year 1925-1926, with an oral agreement that she would be reemployed after the lapse of a year. The respondent testified that in the spring of 1926 she told the principal of the school that she wanted a leave of absence for the next school year and that she later received word that the board had granted her a leave of absence. The principal testified that the respondent told her she wanted a leave of absence for the next year and asked her to present the matter to the board, that she told her she would do so, and that at a meeting of the board in May, 1926, the board granted the leave of absence. One of the five members of the board at that time was dead at the time this case was tried. The other four members each testified that the respondent asked for a leave of absence for that year and that the leave was granted with the consent of all the members present at the meeting. Several of them testified that all of the members of the board were present. One of these board members testified that a motion to grant the leave of absence was made and passed. Three of them testified that it was understood by all that the respondent was to come back after one year and that Mrs. Magnuson was employed for that one year only.

[1] The law at that time required a board to give to a teacher written notice on or before the 10th day of June in any year if her services were not required for the ensuing year. It was stipulated that no such notice was given to the respondent before June 10, 1926. So far as was shown in this case no such notice was given to Mrs. Magnuson in the spring of 1927 and no action was taken by the board to dismiss her or with reference to reelecting the respondent. The only action which appears in this regard is one shown in the minutes of the board during the spring of 1927, which reads: "Resolution adopted to retain the present staff of teachers for another year." Without anything else being done, the respondent assumed her duties at the opening of the school year 1927-1928 and taught continuously thereafter for some years. This resolution, with the subsequent conduct of the parties, is significant as indicating that the respondent was then regarded as one of the "present staff of teachers," which could only be true if she was still an employee and merely on a leave of absence. It is also significant that no re-election was deemed necessary when she returned the next year and was allowed to proceed without any such formality. Assuming that these facts were established by competent evidence, it cannot be said that there was no relationship of employer and employee existing between this district and the respondent during the year in question. The granting of such a leave, which the law authorized the board to do, had the effect of continuing that relationship during the extent of the leave of absence. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. While the right to be paid was suspended during the leave, the employment was not terminated. The only possible question is whether parol evidence could be received to show an action taken by the board which does not appear in their minutes.

[2, 3] It has been held that matters omitted from the record of an administrative board can be proved by evidence unless the law expressly requires such matters to appear of record and makes the record the only evidence thereof. Gordon v. City of San Diego, 108 Cal. 264, 41 P. 301. With respect to a private corporation it has been held that the minutes are prima facie but not conclusive evidence of what they show, and that in the absence of the element of estoppel parol evidence may be

received to show what actually took place at a director's meeting. Cox v. First Nat. Bank, 10 Cal.App.2d 302, 52 P.2d 524. There are particularly good reasons for applying such a rule to the actions taken by the boards of trustees of smaller school districts. The clerks of such boards are often, if not usually, unskilled in keeping such records and the proceedings of such boards are frequently carried on in a more or less informal manner. Regardless of any such informality no good reason appears, in the absence of a law requiring it, for upsetting a definite action taken by such a board when such action can be established by clear and convincing proof. This is the situation here where the fact that a leave of absence was granted for the year in question conclusively appears from the oral testimony and is further supported by such minutes as were actually entered. In our opinion this evidence was properly received and the court was justified in holding that the respondent was granted a leave of absence for the year in question. There was therefore no lapse in the period of employment and it follows that she is entitled to seniority rights as a teacher in said district.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 248

PIERCE et al. v. RIVERSIDE MORTGAGE SECURITIES CO.

Civ. 2151.

District Court of Appeal, Fourth District, California.

March 4, 1938.

As Modified March 17, 1938.

Rehearing Denied March 31, 1938.

Hearing Denied by Supreme Court May 2, 1938.

1. Appeal and error 🔑**110, 782**

An appeal from an order denying a motion for new trial will be dismissed, since such order is not appealable. Code Civ.Proc. § 963, as amended by St.1933, p. 2472.

2. Corporations 🔑**579(2)**

A new corporation taking over assets of old corporation is liable for debts of old corporation where no provision is made for payment of obligations of old corporation, or new corporation expressly or impliedly promises to pay debts of old corporation, or new corporation is but a continuance or reincarnation of old corporation, or sale is fraudulent and property of old corporation can be followed into new corporation.

3. Corporations 🔑**579(2)**

Where sale of assets is made in good faith by old corporation to new corporation and for a sufficient consideration, and new corporation leaves with old corporation sufficient assets with which to pay debts of old corporation, creditor of old corporation cannot collect his debt from new corporation.

4. Corporations 🔑**579(5)**

A new corporation taking over assets of old corporation was not liable to plaintiff for fraud of old corporation where new corporation paid a sum to old corporation more than sufficient to liquidate plaintiff's claim against old corporation and there was no showing of any other claims against old corporation.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Arthur W. Pierce and Bessie R. Pierce against the Riverside Mortgage Securities Company for rescission of a contract of purchase of a deed of trust and promissory note. From a judgment for the plaintiffs, and from an order denying the defendant's motion for a new trial, the defendant appeals. Arthur W. Pierce died after the entry of judgment, and Bessie R. Pierce was appointed administratrix of his estate and has been substituted in his place.

Appeal from order dismissed and judgment reversed.

A. Heber Winder, of Riverside, for appellant.

Clay & Handy, of Los Angeles, for respondents.

MARKS, Justice.

[1] Arthur W. Pierce and Bessie R. Pierce brought this action against defendant for rescission of a contract of purchase of a deed of trust and promissory note from the Riverside Securities Company through the Riverside Mortgage Company. They were successful in their action, and defendant has appealed from the judgment and from the order denying its motion for new trial. Such an order is not appeal-

able, section 963, Code Civ.Proc., as amended by St.1933, p. 2472, and the attempted appeal from it must be dismissed.

Arthur W. Pierce died after the entry of judgment. Bessie R. Pierce was appointed administratrix of his estate and has been substituted in his place.

The second amended complaint sought rescission of the contract of purchase because of fraud on the part of the Riverside Mortgage Company. The trial judge found all of the allegations of fraud to be true. The evidence fails to sustain some of the findings of fraud. However, we will assume that the findings of some of the fraudulent representations find support in the evidence and were of substantial and material facts. This will enable us to proceed to a consideration of the important question presented on this appeal, namely, the responsibility of the Riverside Mortgage Securities Company for the fraud of the Riverside Mortgage Company.

The Riverside Mortgage Company is a California corporation organized for the purpose of dealing in real estate and securities. In 1923 it organized an investment trust. The declaration of trust was amended in 1926. In our statement of facts we will concern ourselves with the declaration of trust as amended.

The declaration of trust carefully avoided use of the words "trust," "trustee," "trustor," and "beneficiaries," but its legal effect cannot be doubted. The Security Title Insurance & Guarantee Company, called escrow holder, was trustee. The Riverside Mortgage Company was the trustor and a beneficiary. Holders of guaranteed investment certificates were primary beneficiaries. The trust fund consisted of real and personal securities and income therefrom as well as money. For brevity, we will refer to the trust estate as securities.

The Riverside Mortgage Company bought mortgages, deeds of trust, and other securities which it deposited with the title company. Guaranteed investment certificates were issued against this trust fund, which was required to equal 125 per cent. of the par value of the outstanding certificates. In case the value of the securities fell below that figure, it became the duty of the title company to demand additional security or money from the Riverside Mortgage Company. In case the added securities or money were not furnished by the Riverside Mortgage Company, the guaranteed investment certificate owners could cause the sale of the corpus of the trust and the distribution of the proceeds, thus liquidating the trust.

The guaranteed investment certificates owners were to receive the interest specified in their certificates. After paying this interest, certificates when due, and the expenses of the trust, any surplus of trust income remaining was paid to the Riverside Mortgage Company.

Some of the mortgages and deeds of trust were not paid and the Riverside Mortgage Company had to take over the encumbered property. In 1926 the Riverside Securities Company was organized by the Riverside Mortgage Company. The Riverside Securities Company was owned and controlled by the Riverside Mortgage Company and acted as a holding company for the Riverside Mortgage Company in taking title to this real property. It also issued mortgages and deeds of trust on some of it.

In August, 1930, the Riverside Securities Company held title to an apartment house in the city of Elsinore. It issued a deed of trust on this property to secure its promissory note in the sum of $5,000, due three years after date, with interest at 8 per cent. per annum, payable to the Riverside Mortgage Company.

In November, 1930, Arthur W. Pierce approached the Riverside Mortgage Company with a view of purchasing a mortgage and note. He was shown the Elsinore property, and, on November 20, 1930, bought the deed of trust on it and the note for $5,000. The property had been sold to a Mrs. Gardner. The interest was paid fairly regularly until some time in 1933 when small amounts of interest were occasionally paid for something over a year. Shortly thereafter interest payments stopped. On November 20, 1930, the apartment house property had a reasonable market value of $7,500.

In 1931 the financial difficulties of the Riverside Mortgage Company became acute. In March of that year it organized the Riverside Mortgage Securities Company under the laws of Delaware. As originally organized, it had classes "A," "B," and "C" preferred stock, besides common stock. It was the idea of the incorporators to sell at least its class "A" preferred stock in order to carry on the operations formerly conducted by the Riverside Mortgage Company. This plan was never carried out because of the intervention of the guaranteed investment certificate owners.

In 1931 guaranteed investment certificates in a sum in excess of $565,000 had been issued against the trust fund. As the value of the securities in the trust fund had become impaired, the title company demanded of the Riverside Mortgage Company that it place additional securities in the trust. As it failed to do this, the guaranteed investment certificate owners were informed of this condition and advised to take steps to protect their interests.

At a meeting of about 500 of these owners, a committee of 7 was selected to study the situation and devise some plan to save as much of the investment as possible. As the market for both real estate and securities was then greatly depressed, it was evident that liquidation of the trust by a sale of the corpus as provided in the declaration of trust would result in a very serious loss to the investors. It seemed advisable to the committee to work towards a slow liquidation of these trust assets. To that end it was decided to take over the Riverside Mortgage Securities Company and reform its corporate structure to fit the new situation as that corporation was already organized. Its articles of incorporation were amended so that it had preferred stock, and class "A" and class "B" common stock. It was proposed to exchange 12½ shares of preferred stock for each $100 guaranteed investment certificate class "A" common stock for the preferred stock of the Riverside Mortgage Company, and class "B" common stock for the common stock of that company. The commissioner of corporations of California authorized these exchanges. The guaranteed investment certificates were to be escrowed with the title company and the exchange effected by it.

A few of the guaranteed investment certificate owners refused to consent to the exchange. Thus the plan worked out by the committee was halted and a sale of the corpus of the trust was forced. After due notice, the sale was had at the Riverside county courthouse. There were several bidders and the Riverside Mortgage Securities Company was finally awarded the property for $128,900. The bid was for cash, but it was not paid in cash. The nonconsenting guaranteed investment certificate holders were paid 27 cents on the dollar for their certificates. The other certificates were canceled and preferred stock of the Riverside Mortgage Securities Company was issued to the owners on the basis we have outlined. Thus the corpus of the trust passed to the corporation and all the guaranteed investment certificates were canceled, their former owners, except those paid in cash, became owners of preferred stock in the Riverside Mortgage Securities Company. The preference on this stock gave these stockholders the first right to dividends and the first right to the assets of the corporation up to the par value of their stock. Neither class of common stock can participate in dividends or distribution of capital assets until the preferred stockholders have been paid in full.

Among the assets of the trust were mortgages or deeds of trust made by the Riverside Securities Company on a number of apartment houses. The incumbrances were released and the properties conveyed to the Riverside Mortgage Securities Company. The apartment houses were furnished, the furniture belonging to the Riverside Securities Company which owed (on the books) a considerable sum to the Riverside Mortgage Company. The Riverside Securities Company sold this furniture to the Riverside Mortgage Company for $73,000 and received a book credit for that amount. Because of failure to pay its franchise tax, the right of the Riverside Securities Company to do business was suspended and it passed peacefully out of the picture.

The Riverside Mortgage Company sold its office furniture and the apartment house furniture to defendant for $32,200. This was apparently paid in cash and as far as the record shows the money actually went into the treasury of the Riverside Mortgage Company. That company is still in existence and is still doing business as some of its stockholders refused to exchange their stock in it for stock in the defendant company.

At the time of the amendment of the articles of incorporation of the Riverside Mortgage Securities Company, it was agreed that 5 of its 7 directors be chosen from the guaranteed investment certificate owners and 2 from the former stockholders of the Riverside Mortgage Company. This agreement was carried out. About 84 per cent. of the issued stock of defendant is owned by former guaranteed certificate owners and the balance by former stockholders in the Riverside Mortgage Company. All classes of stock have equal voting rights.

The sole business of defendant is liquidation of its assets in the hope that its preferred stockholders, former guaranteed investment certificate owners, may receive back as large a portion of their original investments as possible. It is engaging in no other business.

The theory upon which this action was brought is that the Riverside Mortgage Securities Company is a reincarnation of the Riverside Mortgage Company and, as such, is liable to the creditors of that company. Under this theory, the trial court found:

"That it is true that the said Riverside Mortgage Company did, and has, since November 20, 1930, reorganized and continued and merged itself into the defendant, Riverside Mortgage Securities Company, and claims to these plaintiffs, and holds out to these plaintiffs, no metamorphosis of the said Riverside Mortgage Company, and claims to have no obligation to the plaintiffs by reason of the herein alleged transaction, or at all, and the said defendant has taken to itself, without adequate or any consideration, the business and all of the assets of the Riverside Mortgage Company and the Riverside Mortgage Securities Company, and the said defendant by its said acts has left said corporations, and each of them, mere shells without property or credit,and does carry on the business of the said Riverside Mortgage Company.

"That it is true that the said defendant is as to these plaintiffs, the same entity as the Riverside Mortgage Company, and in its stockholders is the same in identity except that its present stockholders are former stockholders in the Riverside Mortgage Company augmented by former creditors of said company who have released their respective claims for the stock of the defendant."

[2] The question of the right of what we will call an old corporation to sue what we will call a new corporation that has taken over the assets of the old has been a frequent source of litigation and the books are full of decisions on that question. There is a surprising harmony of decision along clearly marked and established lines, These are summarized in Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N.W. 717. It is there held that the new corporation is liable for the debts of the old (1) where two corporations consolidate or form a new corporation without making provisions for payment of the obligations of the old; (2) where by express or implied agreement the purchasing corporation promises to pay the debts of the old; (3) where the new corporation is but a continuance (reincarnation) of the old; (4) where the sale is fraudulent and the property of the old can be followed into the new. See, also, Good v. Ferguson & Wheeler Land, L. & H. Co., 107 Ark. 118, 153 S.W. 1107, Ann. Cas.1915A, 544. These rules are somewhat differently stated in West Texas Refining & D. Co. v. Commissioner of Int. Rev., 10 Cir., 68 F.2d 77, 81, as follows:

"The general rule is that where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor. Racine E. & M. Co. v. Confectioners' M. & M. Co. (C.C.A. 7) 234 F. 876, 879; Ozan Lumber Co. v. Davis Sewing M. Co. (D.C.Del.) 284 F. 161, 164; Drovers' & Mechanics' Nat. Bank v. First Nat. Bank (C.C.A.4) 260 F. 9, 14, 15; Burkholder v. Okmulgee Coal Co., 82 Okl. 80, 196 P. 679; Cooper v. Utah Light & Ry. Co., 35 Utah 570, 102 P. 202, 136 Am.St.Rep. 1075; Colorado Springs R. T. R. Co. v. Albrecht, 22 Colo. App. 201, 123 P. 957; Fletcher Cyc. Corporations (Perm.Ed.), vol. 15, § 7122.

"To this general rule there are four well recognized exceptions, under which the purchasing corporation becomes liable for the debts and liabilities of the selling corporation. (1) Where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. Lumber Co. v. Sewing Machine Co., supra; Spring Creek Oil Corp. v. Dillman, 90 Okl. 129, 215 P. 1053; Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 118 N. W. 456, 32 L.R.A. (N.S.) 616; Valley Bank v. Malcolm, 23 Ariz. 395, 204 P. 207; Swing v. Empire Lbr. Co., 105 Minn. 356, 117 N.W. 467; Fletcher Cyc. Corporations (Perm.Ed.), § 7122."

We have been cited to and have found no California cases where it has been necessary to apply the four exceptions to the general rule of corporate nonliability. However, two of them (reincarnation and fraud) have been expressly adopted and the other two are supported by sound reason and by excellent and ample authorities from other jurisdictions. See Koch v. Speedwell Motor Car Co., 24 Cal.App. 123, 140 P. 598, 600; Strahm v. Fraser, 32 Cal.App. 447, 163 P. 680; Anderson v. Van Camp Sea Food Co., Inc., 98 Cal.App. 787, 277 P. 1099; Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 P. 765, 29 Am.St.Rep. 149; Higgins v. California Petroleum Co., 122 Cal. 373, 55 P. 155; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780.

When we analyze the facts before us, we cannot bring them within any of the four settled exceptions to the general nonliability rule. There was no contract, express or implied, on the part of defendant to pay the debts of the Riverside Mortgage Company. The corporate change was neither a consolidation nor a merger. No fraud on the part of defendant is even suggested. Defendant is certainly not a reincarnation of the Riverside Mortgage Company. After the guaranteed investment certificate owners stepped into the picture, the organization and corporate structure of the Riverside Mortgage Securities Company was not dictated by the Riverside Mortgage Company nor its stockholders. The guaranteed investment certificate owners were not acting with the Riverside Mortgage Company, but in opposition to it to protect their own interests. The majority of the board of directors were chosen by them and not by the old company. They owned a majority of the stock. They were not creditors of the old company, as found by the court, but beneficiaries under the trust. They did not buy the corpus of the trust from the old company, but merely changed their beneficial ownership of it under the trust into corporate ownership by defendant in which they were preferred stockholders. The new company is not carrying on the business of the old, but is merely liquidating its own affairs. The old company is conducting its own business and, as far as the record here discloses, is solvent and could have responded to the judgment in this case had it been rendered against it. It is not a mere shell but is a going concern.

The only property of the Riverside Mortgage Company which was purchased by the Riverside Mortgage Securities Company was its office furniture and the apartment house furniture for which was paid $32,200. There is no evidence of the reasonable market value of this personal property. Neither is there any intimation that this purchase price was less than its fair market value unless such inference might arise from the bookkeeping credit and debit entry of $73,000 when the title of the apartment house furniture passed from the Riverside Security Company to the Riverside Mortgage Company. This was really no sale at all, as those two corporations were for all practical purposes one and maintained separate corporate existences merely for the convenience of the Riverside Mortgage Company.

While there is uniformity of decision on the right of a creditor to sue a new corporation for the debts of the old under the conditions we have been considering, this uniformity disappears when it appears that stockholders in the old company have been given stock in the new company. While this situation is not important on this appeal, and as the present judgment must be reversed, citation of some of these authorities without further comment by us may be advisable. See, Strahm v. Fraser, supra; Central of Georgia R. Co. v. Paul, 5 Cir., 93 F. 878; Fogg v. Blair, 133 U.S. 534, 10 S.Ct. 338, 33 L.Ed. 721; Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 14 S.Ct. 127, 37 L.Ed. 1113; Kansas City S. R. Co. v. Guardian Tr. Co., 240 U.S. 166, 36 S.Ct. 334, 60 L.Ed. 579; Alberger Cond. Co. v. United Water, etc., Co., 87 Kan. 843, 126 P. 1087; Skirvin Operating Co. v. Southwestern Electric Co., 71 Okl. 25, 174 P. 1069, 15 A.L.R. 1104; Geo. E. Warren Co. v. A. L. Black Coal Co., 85 W.Va. 684, 102 S.E. 672, 15 A.L.R. 1083; Wolff v. Shreveport, etc., Co., 138 La. 743, 70 So. 789, L.R.A.1916D, 1138; Male v. Atchison, etc., Co., 230 N.Y. 158, 129 N.E. 458, 15 A.L.R. 1098; Davis v. Hemming, 101 Conn. 713, 127 A. 514, 39 A.L.R. 133. See, also, note 15 A.L.R. 1112 et seq.

[3] It seems to be established by well-considered authorities, some of them already cited, that where the sale is made in good faith by the old corporation to the new, and for a sufficient consideration, and the new corporation leaves with the old sufficient assets with which to pay its debts, a creditor of the old corporation cannot collect his debt from the new. This rule is thus stated in American Railway Express Co. v. Commonwealth, 190 Ky. 636, 228 S.W. 433, 437, 30 A.L.R. 543:

"It is equally well settled that when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, or property that may be subjected to the payment of its debts and liabilities, equal to the fair value of the property conveyed by it, the purchasing corporation will not, in the absence of a contract obligation or actual fraud of some substantial character, be held responsible for the debts or liabilities of the selling corporation. Many illustrative cases fully supporting these propositions may be found in volume 5, Thompson on Corporations, § 6517; 7 R.C.L. 180; 10 Cyc. 307; notes in 11 L.R.A. (N.S.) 1119; 32 L.R.A. (N.S.) 616; 47 L.R.A. (N.S.) 1058."

This question was before the Supreme Court of California in Atkinson v. Western D. Syndicate, 170 Cal. 503, 150 P. 360, 363, where it was said:

"Some reference should also be made to another rule relied on by the appellant and declared in some of the cases cited by him. It is well settled that: 'If the stockholders of a corporation organize another corporation, and transfer all of the assets of the former to the latter, without paying the debts of the former, the transfer, irrespective of the actual intention of the parties, constitutes a fraud on the creditors of the old corporation, and the new corporation is liable in equity for the debts of the old to the extent of the assets received by it.' 2 Cl. & M. Priv.Corp. § 342i; Hibernia, etc., Co. v. St. L. & N. O. Transp. Co. (C.C.) 13 F. 516. Such transfer is not, however, necessarily fraudulent where the grantor retains substantial assets or where a full and adequate consideration is paid by the transferee. 2 Cl. & M. Priv.Corp. § 342i. There was evidence in this case which authorized the court to conclude that the conveyances complained of came within the exception. Referring specifically to, the transfer against which the most serious attack is directed (i. e., that to the Golden Gate Tile Company), there was evidence that the Crushed Rock Company still retained assets of considerable value. And, as we have already pointed out, the court was warranted in finding that a consideration of over $14,000 had been paid for this conveyance—a consideration which, in the absence of evidence to the contrary, the court had a right to take to be equal to the value of the property transferred."

[4] In the instant case, the evidence shows that the Riverside Mortgage Securities Company paid the Riverside Mortgage Company $32,200 for personal property. There is no showing that any one other than plaintiffs had any claim against the Riverside Mortgage Company. The $32,200 paid to it for the personal property was more than sufficient to liquidate plaintiffs' claim. In the absence of evidence to the contrary, it may be assumed to be an adequate consideration. Under these facts, and the rule of law just considered, the judgment here cannot be sustained.

The attempted appeal from the order denying the motion for new trial is dismissed. The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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25 Cal.App.2d 130

PEOPLE v. WEBB.

Cr. 1602.

District Court of Appeal, Third District, California.

Feb. 21, 1938.

1. Criminal law 🔑13

Statute providing that no act committed by person while in state of voluntary intoxication is less criminal because of such condition but whenever intent is necessary element jury may consider intoxication in determining intent with which he committed act is not ambiguous and is not subject to construction that statute deals with two distinct classes of crime, first part of statute applying only where intent is inferred from commission of act and latter part referring to all other offenses in which specified intent must be established as essential element of crime charged. Pen.Code, § 22.

2. Criminal law 🔑808½

In burglary prosecution wherein defense interposed was that at time of alleged burglary accused was unconscious by reason of intoxication and was incapable of forming necessary intent to commit crime, instructing in language of statute that no act committed by person while in state of voluntary intoxication is less criminal because of such condition, but that when existence of particular intent is necessary element to constitute particular species or degree of crime, jury may consider intoxication in determining intent was not error. Pen.Code, § 22.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

James William Webb was convicted of burglary in the first degree, and he appeals. Affirmed.

James F. Gaffney, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

[1, 2] Defendant was accused of the crime of burglary, and after a trial was found guilty of burglary of the first degree.

There is no dispute that defendant entered an inhabited dwelling house in the nighttime and took therefrom certain articles of personal property. The defense interposed was that at the time of the alleged burglary the defendant was unconscious by reason of intoxication and was incapable of forming the necessary intent to commit the crime charged.

As grounds for reversal, it is urged that under the peculiar facts of this case the court erred in giving an instruction in the language of section 22 of the Penal Code, as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

As we understand the argument of defendant, he contends section 22 of the Penal Code deals with two distinct classes of crime, the first sentence applying only where intent is inferred from the commission of the act itself, and the latter part of the section is to be read as distinct from the first sentence and refers to all other offenses in which a specified purpose, intent, or motive must be established as an essential element of the crime charged.

Appellant draws this distinction, first, from the use of the comprehensive word "no" in the beginning of the sentence: "No act * * * is less criminal" etc., and by the conjunction "but" indicating an exception to the first of the section.

We believe appellant is attempting to draw too fine a distinction in the use of the words. Reading the section as a whole, it appears to us clear of an ambiguity.

Here the defendant was accused of burglary in which intent was an element, and the jury were so instructed, and after listening to all of the evidence, found that the defendant was of sufficient mentality to form a criminal intent.

In People v. Phelan, 93 Cal. 111, 28 P. 855, an instruction was given that evidence of drunkenness could only be considered for the purpose of determining the degree of the crime. In that case, however, there was no question as to the degree, as the evidence, without conflict, established the crime as burglary of the first degree. As given, therefore, the question of intent was erroneously withdrawn from the jury. To the same effect is People v. Neetens, 42 Cal.App. 596, 184 P. 27.

Beginning as early as People v. Lewis, 36 Cal. 531, and frequently approved in later cases, the court has stated that drunkenness was no excuse for the commission of a crime, and insanity produced by intoxication did not destroy responsibility when the party, when sane, made himself voluntarily intoxicated, for the law will not permit a person to avail himself of his own misconduct to shelter himself from the legal consequences thereof.

In People v. Phelan, supra, the court there definitely held that drunkenness may be shown in a case of burglary; for there the entry into the building must be made with a particular intent in order that the crime may be made out; and that case comes directly within the purview of section 22 of the Penal Code.

For the foregoing reasons, the judgment and order appealed from are affirmed.

25 Cal.App.2d 341

SPARKS v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.

Civ. 2032.

District Court of Appeal, Fourth District, California.

March 15, 1938.

Physicians and surgeons 🔑11(3)

Certiorari will not lie to review the action of the State Board of Dental Examiners in revoking or suspending license of a dental practitioner, since board in so acting is exercising discretionary administrative functions and is not exercising judicial powers.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by P. A. Sparks to review and annul an order of the Board of Dental Examiners of the State of California suspending petitioner's license to practice dentistry. From a judgment affirming the order of the board, petitioner appeals.

Appeal dismissed.

Ray Miller, of San Diego, for appellant.

Harry E. Lindersmith, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The petitioner sought and obtained a writ of review in an effort to annul an order of the respondent board suspending his license to practice dentistry for a period of five years. After a hearing the trial court entered a judgment affirming the order of the respondent board, from which judgment this appeal was taken.

The respondent has moved to dismiss this appeal upon the ground that the writ of certiorari will not lie to review the action of this board in revoking or suspending the license of a dental practitioner for the reason that in so suspending or revoking a license to practice dentistry that board is exercising discretionary administrative functions and is not exercising judicial powers.

Under certain recent decisions we feel compelled to grant this motion to dismiss. Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 59 P.2d 119; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296; Jacobs v. Board of Dental Examiners, Cal.App., 75 P.2d 96; MacCracken v. Board of Medical Examiners, Cal.App., 74 P.2d 289; O'Donnell v. Board of Medical Examiners, Cal.App., 70 P.2d 246; Hartman v. Board of Chiropractic Examiners, Cal.App., 66 P.2d 705.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 297

FLOYD v. RISKIN.

RISKIN v. FLOYD.

Civ. 11670.

District Court of Appeal, Second District, Division 2, California.

March 10, 1938.

Rehearing Denied March 28, 1938.

1. Pledges 🔑24

Evidence *held* to sustain judgment for pledgee of necklace against owner on ground that pledgor, who pledged necklace without disclosing fact that he was not the owner, was allowed to assume apparent ownership of the property for the purpose of transferring title for the owner, under statute prohibiting a person to defeat a pledge of property to a pledgee who receives the property in good faith in ordinary course of business and for value. Civ.Code, § 2991.

2. Replevin 🔑103(4)

In claim and delivery action to recover possession of necklace, wherein sheriff took possession of the necklace which was later delivered to plaintiff, defendant could not recover possession of necklace or its value, in absence of a formal claim in defendant's pleadings for return thereof. Code Civ. Proc. § 667, as amended by St.1933, p. 1836.

CRAIL, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Shelton, Judge.

Action by Louise R. Floyd against A. Riskin to recover a pearl necklace, wherein the defendant filed a cross-complaint. From adverse judgments, the plaintiff appeals, and, from an order denying a new trial, the plaintiff purported to appeal.

Judgments reversed, and purported appeal from order denying new trial dismissed.

Shattuck, Davis & Story, Edward S. Shattuck, and Karl Lynn Davis, all of Los Angeles, for appellant.

Murray M. Chotiner, Albert Jack Chotiner, and Henry L. Traub, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced a claim and delivery action against defendant to recover possession of a valuable pearl necklace. The action was commenced on June 1, 1936, and on the same day the sheriff took possession of the necklace under proper legal process. The return of the necklace to defendant was not required within the statutory period, and on June 9, 1936, it was delivered to plaintiff. In defendant's answer, filed June 20, he did not claim a return of the necklace, but asked that plaintiff take nothing by her complaint and that he recover costs of suit. With his answer defendant filed a cross-complaint in which he asked judgment against plaintiff in the sum of $1,000 with interest at the rate of 2 per cent per month from November 11, 1935, but did not ask the return of the necklace. The trial court made separate findings and judgments on the complaint and on the cross-complaint. In the judgment on the complaint it is provided that: "Judgment is given against plaintiff for the return of said property to defendant, or, in the event that a return is not had within ten days from the date hereof, judgment is given against plaintiff and in favor of defendant for $1,000.00, together with interest thereon at the rate of 2 per cent per month from the 11th day of November, 1935, until paid, together with defendant's costs and disbursements incurred in said action amounting to the sum of $34.55. It Is Further Ordered, Adjudged and Decreed that on the payment of the sum of $1,000.00 together with interest thereon at the rate of 2 per cent per month from the 11th day of November, 1935, and defendant's costs and disbursements incurred in said action, that the plaintiff shall be entitled to the immediate and exclusive possession of said personal property." In the judgment on the cross-complaint it is provided: "That the cross-complainant do have and recover of and from the cross-defendant the sum of $1,000.00 together with interest thereon at the rate of 2 per cent per month from the 11th day of November, 1935, until paid, together with cross-complainant's costs and disbursements incurred in said action, amounting to the sum of $———. It Is Further Ordered, Adjudged and Decreed that upon the payment of the said sum of $1,000.00 together with interest thereon at the rate of 2 per cent per month from the 11th day of November, 1935, and cross-complainant's costs and disbursements incurred in said action, that the cross-defendant shall be entitled to the immediate and exclusive possession of said personal property described as one Oriental pearl necklace having 85 graduated pearls, with platinum clasp attached, said clasp containing one square-cut emerald weighing 11.65 carats." Plaintiff has appealed from both of these judgments.

Plaintiff was the owner of the necklace in question and wished to secure a certain bracelet provided a purchaser could be found who would pay enough for the pearls which were part of the necklace to enable her to buy the bracelet. J. W. Hopkins, a jeweler, had previously had numerous business transactions concerning jewelry with both of the parties to the litigation. Plaintiff delivered the necklace to Hopkins under instructions, according to her testimony, to secure a purchaser for the pearls in the necklace but not for the clasp. The evidence is in conflict on the question whether Hopkins had authority to make a transfer of the necklace without further consultation with plaintiff, but the trial court found upon sufficient evidence that plaintiff gave to Hopkins full authority to sell and transfer title to the property.

[1] Hopkins took the necklace to the establishment of defendant and pledged it for a loan of $1,000, for which he gave his personal note, without informing defendant of the ownership in plaintiff. Section 2991 of the Civil Code provides: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." There is ample evidence in the record to uphold the trial court's ruling that this section is applicable to the facts of the case.

[2] The judgment must be reversed, nevertheless, for the reason that defendant did not in his pleadings ask for a return of the necklace to him. Section 667 of the Code of Civil Procedure, as amended by St.1933, p. 1836, provides in part: "If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." It has been held in a number of decisions that by this section it is made a duty of the defendant to assert in his pleadings his formal claim for a return of the property as a prerequisite to a judgment for its return to him or for its value. It is a statutory requirement. 5 Cal.Jur., p. 192; Lee v. De La Motte, 47 Cal.App. 23, 189 P. 1034; Pico v. Pico, 56 Cal. 453; Banning v. Marleau, 101 Cal. 238, 35 P. 772; Imperial Valley Auto v. Toney, 47 Cal.App. 541, 190 P. 1043.

The judgments are reversed. The purported appeal from the order denying a new trial is dismissed.

I concur: McCOMB, J.

CRAIL, Presiding Justice (dissenting).

I dissent from the order reversing the judgment. In my opinion the prayer for general relief was, under all the circumstances of this case, a prayer for the return of the property within the purview of the statute.

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25 Cal.App.2d 328

SCHLICHTEN v. CHRISTIN.

Civ. 10731.

District Court of Appeal, First District, Division 2, California.

March 15, 1938.

1. Money received 🔑18(3)

In action for money had and received, evidence disclosing that plaintiff paid money to defendant to be loaned for plaintiff, that defendant made loan evidenced by note payable to third party, and that third party never indorsed or assigned note, sustained finding that plaintiff's money was not invested in note, so that loss on note could not be charged against plaintiff.

2. Money received 🔑18(3)

In action by plaintiff, who paid money to defendant to be loaned for plaintiff, for money had and received, evidence which did not show that at time plaintiff received benefits of purported transfer of loan to her she knew source thereof did not establish that she acquiesced in transfer of loan to her, so as to make plaintiff chargeable with loss resulting from loan.

3. Money received 🔑18(3)

In action by plaintiff, who paid money to defendant to be loaned for plaintiff, evidence was insufficient to establish that plaintiff authorized purported transfer of loan to plaintiff's account so as to render plaintiff chargeable with loss resulting from loan.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Margarethe Schlichten against Charles A. Christin, to recover a judgment for moneys had and received. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rowland R. King and Thomas J. Keegan, both of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendant to recover a judgment for moneys had and received. The trial court made findings in favor of the plaintiff and from the judgment entered thereon the defendant has appealed.

The judgment fixed the amount of recovery at $9,137.19. That sum included an item of $2,000 arising out of what was known as the Kummerlander loan. Said item is the subject-matter of findings numbered 3, 6 and 9. The defendant contends that said findings are not supported by the evidence. That contention involves a consideration of the following facts: Commencing as early as 1923 the defendant engaged in receiving sums of money from various persons as a trustee. Under the terms of said trust the defendant undertook to receive from such persons moneys in various sums, to invest the same in making second mortgage loans, to collect the interest and principal as the same should fall due, and to account to the trustors therefor. No agreement was made under the terms of which the identity of the funds paid to him by any certain trustor would be preserved. When so inclined the defendant contributed his own funds in part to make loans. Moneys received from trustors were deposited in the defendant's name and later they were deposited in his "Special Account." As some of the loans made by him were in large amounts, and some of the moneys received by him were in small amounts, in some instances the moneys of two or more trustors were combined to make a single loan. In other instances moneys were received from a trustor, loaned in his name, and security taken in his name. If and when the latter course was pursued, nothing was contained in the trust agreement which in any manner authorized the defendant to alter the rights of any trustor under the laws governing, and applicable to, negotiable instruments.

On August 31, 1923, plaintiff paid to the defendant $7,500 to be loaned for her. Shortly thereafter she paid him an additional sum of $5,000 for the same purpose. Said sums were deposited by the defendant in his bank account. They were also entered in his books of account. From time to time different loans were made to different persons, but no deed of trust or note secured by such deed of trust showed on its face that plaintiff had any interest therein.

[1] Under the uncontradicted facts, a loan of $2,000 was made to Mr. and Mrs. Kummerlander. Said loan was a second deed of trust on real estate. It was evidenced by a note made payable to Helen Noble Jenkins, one of said trustors. The payment of the note was secured by a deed of trust, naming as trustee Mrs. Claya Budd, who was then the secretary of the defendant. There is no evidence that Helen Noble Jenkins ever indorsed or assigned said note. There is no evidence that the plaintiff ever purchased said note. In short, there is no evidence connecting the plaintiff with the title to said note except as follows: The defendant testified that he made entries in his books of the debits and credits showing that the Kummerlander loan was transferred to the plaintiff. He did not state that any moneys were used in the transaction. He testified that the plaintiff's moneys were commingled with his own and with the moneys of other trustors and, we may infer, if any moneys were used they were taken out of the commingled funds. Mrs. Budd testified to facts similar to and not materially different from the testimony of the defendant. Under these facts the trial court did not err in finding that the plaintiff's moneys were not invested in said note. Later the first mortgage on the Kummerlander property was foreclosed and the second deed of trust in the sum of $2,000 was wholly lost.

Throughout the trial the plaintiff contended that under all of the facts there was nothing to show the loss on the Kummerlander loan should be charged to her. However, the defendant contended that by the entries made in his books of account the Kummerlander loan was transferred to the plaintiff and that the loss incurred thereon, to wit, the sum of $2,000, was chargeable to the plaintiff. In this connection he argues that "the evidence introduced in respect to the Kummerlander loan conclusively establishes the fact that this loan was for the account of the plaintiff and was lost through no fault of the defendant." So far as our attention has been called to any passage in the record it will be conceded at once that the loss did not occur through any fault of the defendant. However, the facts recited above show that the loan was made for Helen Noble Jenkins, that she is still the owner and holder thereof, and there is no evidence, except said entries in defendant's books of account, which tie the loss to this plaintiff, nor that show defendant was authorized to charge such loss to the plaintiff.

[2] In his next point the defendant contends that the plaintiff authorized, approved, and acquiesced in the type of loan made by the defendant, and acquiesced in the various transfers of these loans. The first part of that contention will be conceded at once. But there is nothing to show that this plaintiff acquiesced in the purported transfer to her account of the Kummerlander note, that she ever knew anything about the transaction until long after the purported transfer had been made, nor, after she was informed of the purported transfer, that she did anything whatever indicating her acquiescence in the purported transfer. The defendant states she received the benefits of the Kummerlander loan from the date of the purported transfer to her. There is evidence in the record to that effect, but there is no evidence showing at the time she received such

benefits she was informed as to the source thereof.

[3] In his last point the defendant states that the method employed by him in making investments was not unauthorized. Generally speaking, that statement is sustained by the evidence. However, if the defendant means that the plaintiff authorized the purported transfer of the Kummerlander loan to her account in the manner hereinabove indicated, then he is mistaken. We find nothing in the record showing that she directly or indirectly authorized such transfer.

In nothing we have said are we to be understood as holding that the defendant is bound to bear the loss of the $2,000 incurred on the Kummerlander loan. But there is no evidence showing that this plaintiff should bear the burden. There are facts contained in the record showing or tending to show that such burden should have been borne by the several different persons engaged in the venture. 3 C.J. 868. But under the pleadings as framed no such issues were presented to the trial court nor are we called upon to express an opinion thereon.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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25 Cal.App.2d 301

PEOPLE v. AVANZI.

Cr. 3071.

District Court of Appeal, Second District, Division 2, California.

March 10, 1938.

1. Criminal law 🔑53

An act committed by a person while in a state of voluntary intoxication is none the less criminal by reason of such condition.

2. Criminal law 🔑355

When the actual existence of any particular purpose, motive or intent is necessary element to constitute any particular degree of crime, that accused was intoxicated at the time may be considered by the trier of fact in determining the purpose, motive, or intent with which the act was committed. Penal Code, § 22.

3. Criminal law 🔑55

In prosecution for sex perversion, no particular purpose, motive, or intent is necessary element of crime, and whether defendant was intoxicated at time of commission of prohibited act is immaterial. Penal Code, §§ 22, 288a.

4. Criminal law 🔑1023(10)

An appeal does not lie from a sentence.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Frank Avanzi was convicted of violation of section 288a of the Penal Code, and from the judgment and sentence he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter Bowers, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From a judgment of guilty of violation of section 288a of the Penal Code after trial before the court without a jury defendant appeals. There is also a purported appeal from the sentence.

Viewing the evidence most favorable to the People (respondent), the facts in the instant case are:

September 20, 1937, while in a state of voluntary intoxication, defendant committed an act prohibited by section 288a of the Penal Code upon a female eight years of age.

Defendant relies for reversal of the judgment on the following proposition:

Defendant was not guilty of the offense of which he was convicted, because at the time of the alleged offense he was in a state of voluntary intoxication.

[1, 2] This proposition is untenable. An act committed by a person while in a state of voluntary intoxication is none the less criminal by reason of his having been in such condition. People v. Burkhart, 211 Cal. 726, 731, 297 P. 11. Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the fact that the accused was intoxicated at the time may be taken into consideration by the trier of fact in determining the purpose, motive,

or intent with which the act was committed. Pen.Code, § 22.

Section 288a of the Penal Code reads as follows:

"Any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding fifteen years."

[3] It is clear that no particular purpose, motive, or intent is a necessary element of the crime described. Therefore in the present case it was immaterial whether defendant was intoxicated or not at the time he committed the prohibited act.

[4] An appeal does not lie from the sentence. People v. Arrangoiz, Cal.App., 74 P.2d 789; People v. Freeman, Cal. App., 75 P.2d 640. Therefore the purported appeal from the sentence is dismissed.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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25 Cal.App.2d 332

PEOPLE v. WILSON.

Cr. 3075.

District Court of Appeal, Second District, Division 2, California.

March 15, 1938.

1. Criminal law ⇐260(11)

In prosecution for burglary, whether defendant attempted to enter store, and whether attempt was made with innocent or felonious intent, was for the trial court sitting without a jury.

2. Burglary ⇐41(1)

Evidence that a man was observed at door of store, that defendant shortly thereafter was apprehended by police officers who discovered various tools in his possession, the measurements of which corresponded with indentations made in and about the store door, authorized conviction of attempted burglary in the second degree.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Austin M. Wilson was convicted of attempted burglary in the second degree, and he appeals.

Affirmed.

Vernon R. Hamilton and Morris Lavine, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

WOOD, Justice.

At a trial before the court without a jury the defendant was convicted of the crime of attempted burglary in the second degree. He now contends that the evidence is insufficient to sustain the conviction.

It is charged that defendant attempted to burglarize the Safeway store on Adams street in the city of Los Angeles. Adjoining the store there is an apartment house and on October 5, 1937, at about midnight Mr. and Mrs. Burch, the occupants of an apartment on the ground floor of the apartment house, were attracted by an unusual noise at the door of the store. Mr. Burch looked out of his window, saw a figure at the door, and heard a "prying noise" at the door of the Safeway store. Mrs. Burch telephoned to the police while Mr. Burch continued to observe the man at the door until he went toward an alley. The manager of the apartment house was aroused and he saw defendant walking up the backstairs of the apartment house. Walking toward the rear the manager encountered defendant knocking at one of the doors. Defendant started to leave and the manager told him to wait, that the occupant of the apartment was opening the door. Defendant nevertheless went down the stairs. Police officers arrived at about this time and took from defendant's pockets a small sledge hammer, a screw driver, a pair of pliers, a small chisel, a jimmy or tire tool, and a file. Defendant stated that he did not know what he was doing with the tools or where he got them. The tools found on defendant were examined and measured and were found to correspond with indentations made in and about the door of the store. A chemist testified that he had examined some orange paint which he found upon one of the tools in defendant's possession and had compared it with paint he took from the store building. He expressed the opinion that the paints were of common origin and had come from the same pot.

[1, 2] Defendant did not testify in his own behalf. His counsel refer to the testimony of a police officer that defendant appeared to be in a stupor and contend that the evidence is insufficient to establish the intent to commit burglary. They argue that defendant's purpose might have been to find a place to sleep or to use a lavatory "or for some other innocent purpose." It was for the trial court to determine whether defendant attempted to enter the store and the purpose for which the attempt was made. The evidence is sufficient to sustain the findings that defendant attempted to enter with felonious intent.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

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25 Cal.App.2d 262

PALMER et al. v. FRIEDMAN et al.

Civ. 10725.

District Court of Appeal, First District, Division 2, California.

March 8, 1938.

1. Bills and notes 🔑519

In action for deficiency after foreclosure of trust deed, evidence *held* to sustain judgment against indorser of note evidencing secured indebtedness, on ground that indorsement was in nature of guarantee and that indorser did not first indorse a note evidencing indebtedness "without recourse," and then subsequently indorse another note without consideration and after loan was made. Civ.Code, § 3119.

2. Bills and notes 🔑293

An indorsement "without recourse" would not constitute an indorsement in the nature of a guarantee. Civ.Code, § 3119.

3. Trial 🔑29(1)

In action for deficiency after foreclosure of trust deed, wherein uncontradicted evidence showed loan was made on condition that indorser sign note, and indorser sought to prove that he agreed to indorse "without recourse," trial court's remark justifiably disparaging such alleged defense was not error.

4. Appeal and error 🔑1046(5)

In action for deficiency after foreclosure of trust deed, wherein uncontradicted evidence showed that loan was made on condition of an indorsement and indorser sought to prove that his indorsement "without recourse" was accepted by the lender, any error in trial court's remark disparaging such alleged defense was not prejudicial, where remark was not acted upon and witnesses were examined and cross-examined as to the facts, and item of evidence referred to was not connected in the proof of the indorser.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Bessie Palmer and others against Joseph Friedman and others for deficiency after a sale had under a deed of trust. From an adverse judgment, defendant Aaron Friedman appeals.

Affirmed.

Young, Hudson & Rabinowitz, of San Francisco, for appellant.

Orrick, Palmer & Dahlquist, of San Francisco, for respondents.

STURTEVANT, Justice.

[1, 2] The plaintiffs commenced this action to recover $28,787.22 claimed to be the amount of the deficiency after a sale had under a deed of trust. Judgment went in favor of the plaintiffs and against all of the defendants. Aaron Friedman, one of the defendants, appealed. It was the contention of the plaintiffs, as shown in their complaint and the evidence offered in support thereof, that on the 26th day of March, 1930, the plaintiffs agreed to lend and the defendants agreed to borrow $65,000 to be evidenced by a promissory note to be executed by Joseph Friedman and Ernestine Friedman payable to these plaintiffs. It was further agreed that said note would be indorsed by the defendant Aaron Friedman and its payment would be secured by a trust deed executed by the makers of the note as trustors, to California Pacific Title & Trust Company as trustee, in favor of these plaintiffs as the beneficiaries. Thereafter such a note was executed, the deed of trust was executed, and the money was loaned. Each and all of the foregoing facts appeared from the fact of the written in-

struments and the direct evidence of two or more witnesses. However, it was contended by the defendants that four days after the above-mentioned note was executed, Mr. Silas Palmer, acting for all of the plaintiffs, directed the trustee to obtain a different note in the place of the above-mentioned note, that it did so, that the second note is the one sued on, and that it is the sole embodiment of the contract between the parties. It is further contended that the first note was indorsed by Aaron Friedman without recourse, and that therefore no judgment should be entered against the indorser. It is further contended that no consideration was received by Aaron Friedman and that the second note was executed after the money was loaned and paid over to the trustors, and therefore the purported contract of guarantee was not enforceable against Aaron Friedman. If the facts were as contended by the defendant his conclusions would be sound, but the facts were found in favor of the plaintiff and against the defendant on each and all of said issues. The latter contends that the findings are not supported by the evidence because the evidence was inherently improbable. We find no merit in that claim. Bearing in mind that the trustors were the owners of the real estate, the indorsement of Aaron Friedman was in the nature of a guarantee, but an indorsement without recourse would not be. Civ.Code, § 3119; Leekley v. Short, 216 Iowa 376, 249 N.W. 363, 91 A.L.R. 394, note 399. No witness testified that the plaintiffs ever agreed to accept such an indorsement by Aaron Friedman. It would require patent facts to justify the trial court in holding that sensible business men entered into an empty contract regarding a transaction involving $65,000. Again, there is no evidence excepting that of Aaron Friedman and F. J. Williams, his real estate broker, that an indorsement "without recourse" was written on the first note. Neither of them claimed to have delivered or to have seen delivered such a document. Moreover, there was in the testimony of each of them certain facts tending strongly to indicate that the testimony of each was not worthy of belief.

Another point is made to the effect that the trial judge was guilty of misconduct in the trial of the case. That alleged misconduct consists of certain remarks made by the judge. We have carefully read the transcript and we find no foundation for the assignment of misconduct. At the time the remarks were made the defendant was apparently of the same opinion, for no assignment of misconduct was noted by the defendant, no exception was noted, and no application was made to the trial judge to strike out any alleged improper statement.

[3, 4] The incident complained of was the following: At a trustee's sale of real estate, Joseph Friedman bid in a piece of property for $65,000. He did not have the money. He applied to Silas Palmer, one of the plaintiffs, for a loan. The latter stated he would make the loan if Aaron Friedman would indorse the note. These facts are not contradicted. On the trial the defendant sought to prove that Aaron Friedman stated he would "indorse but without recourse," and Silas Palmer accepted that promise and the note was so written. When the question was propounded to one of the witnesses, the trial judge remarked, "It can't be true. What would be the good of such a statement? An indorsement without recourse does not mean anything. That could not have happened. What is the use of insulting the intelligence of a court by trying to bring that in?" The statement made by the trial judge was entirely true. If so, then how can it have been error to have declared the fact in open court? Moreover, the error, if any, was not prejudicial for two separate reasons. In the first place the remark of the trial judge was not acted upon. Every witness was examined and cross-examined as to the facts. In the second place the item of evidence was not connected in the proof of the defendant. The claim of the defendant Aaron Friedman was that the first note hereinabove mentioned was indorsed without recourse. If such was the fact, then it follows that the second note was substituted therefor, and there is no evidence to that effect. On the contrary, the trust officers participating in the transfer were called, examined, and cross-examined, and the testimony of each was to the effect that the note sued upon was the original note and the only note indorsed by Aaron Friedman.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

25 Cal.App.2d 361

NEWBERY et al. v. NOZU.

Civ. 1858.

District Court of Appeal, Fourth District, California.

March 15, 1938.

Licenses ⚿18½

Evidence sustained findings that vendor who agreed to sell a parcel to B. who thereupon resold to purchaser did not, by executing deed which conveyed one parcel directly to purchaser, thereby issue a security within the Corporate Securities Act so as to entitle purchaser to recover purchase money paid to B. and repaid to vendor on the ground that vendor had no permit to sell securities, where two separate transactions were involved and if any security was issued it occurred when B. caused the deed to be delivered to purchaser and not when vendor signed it. St.1933, p. 2316, § 16.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Cad M. Newbery and another against Amy Hatzuko Nozu for money had and received, which was alleged to have been paid to defendant for a void conveyance of land. Judgment for defendant, and plaintiffs appeal.

Affirmed.

W. E. James, of Bakersfield, for appellants.

Borton, Petrini & Conron, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for the recovery of money had and received. The plaintiffs' theory was and is that they paid $2,000 to the defendant for the conveyance of an undivided fractional interest in certain land, that the deed they received was issued in violation of the Corporate Securities Act as amended in 1933, St.1933, p. 2316, § 16, and void, and that the defendant, having been unjustly enriched, holds the money for their benefit.

The facts are practically undisputed and may be briefly stated as follows: The defendant owned 160 acres of land in Kern county which she had leased for the purpose of exploring for oil, reserving to herself a one-eighth interest in any oil that might be recovered. She listed 40 acres of this land with a real estate agent for sale subject to the oil lease as it affected that part of the land. This real estate agent interested a lawyer named Black in purchasing the 40 acres for the price of $13,500. An escrow was opened but the deal fell through. Thereafter, Black again approached the defendant with reference to purchasing the 40 acres. She told him that since "you fooled me already" she would sell to him only if and when he put up the money, and sent him to see her lawyer. She then gave Black two weeks in which to put up the money and said she would sell to him if he did so. About two weeks later Black went to the lawyer's office with $13,500 and offered to deposit it and close the deal. The defendant was called to the office and upon being told that the money was ready indicated that she was ready to sign the necessary papers. Some nine deeds were presented for her signature, which together covered the 40 acres, one of them being a deed to the plaintiffs for an 8/100 interest in the 40 acres subject to the oil lease which has been mentioned. The defendant said to Black "Are you going to let me sign all those papers? I thought you were going to buy it," to which Black replied that he was going to buy it but was selling part of it. She signed the deeds and instructed her attorney to close the deal. Her attorney went to Bakersfield with Black and an escrow was opened with an abstract company. Black signed escrow instructions reciting that he had handed the escrow holder $13,500 which was to be delivered to the defendant when the deeds signed by her were recorded and when title could be shown subject to the previous oil lease. The defendant's attorney signed an approval of the escrow instructions for her, each paid half of the escrow charges, Black put up the $13,500, the escrow was closed, the money was paid to the defendant, and the deeds were recorded.

It appears that some two months before the escrow was closed Black had entered into negotiations with the plaintiffs with a view to selling them 1 per cent. of the mineral rights underlying the 40 acres which the defendant thus sold. About seven weeks before the escrow was closed the plaintiffs paid $2,000 to Black as and for the full purchase price of 1 per cent. of the mineral rights underlying this 40 acres. It was stipulated that $1,500 of this $2,000 was used by Black in making up the $13,500 which he paid to the defendant. The plaintiffs testified that they had never seen the defendant, that all of their negotiations were with Black, that they discovered that their part of the land had cost Black only $1,500 when they received the deed and saw that it contained $1.50 worth of revenue stamps, and that they were not surprised at this as they were paying no commission to Black and were only interested in the price they had agreed to pay for their interest. Some five months after the escrow was closed the plaintiffs went to Black and demanded a policy of title insurance which he promised to furnish. About eleven months later the plaintiffs demanded $2,000 from the defendant and this action followed.

Briefly stated, the court found that it is not true that the defendant received $2,000 from the plaintiffs, or any other sum, or that she agreed to convey to the plaintiffs a mineral title or any other property; that the defendant did not enter into an agreement with the plaintiffs in any respect whatsoever; that the defendant agreed to convey to Black for the sum of $13,500 the 40 acres of land described in the complaint; that Black paid to the defendant the purchase price of said land; that the transaction was one of purchase and sale between the defendant and Black; that in consummating the transaction the defendant acceded to Black's request and executed the deeds to the various grantees named and delivered these deeds to Black; that the plaintiffs paid to Black the sum of $2,000 for one of these deeds; that the defendant received the sum of $1,500 for said deed and received the same from Black; that the defendant did not sell or issue a security either to the plaintiffs or to Black but that the transaction constituted a sale by the defendant to Black of the specific real property which was described; that the defendant received no moneys or other benefits from the plaintiffs or either of them; that in said transaction Black did not act as the agent of the defendant or as the agent of the plaintiffs but that he acted independently as a purchaser of said 40 acres of land; that the defendant had no knowledge of the nature or terms of the transaction between Black and the plaintiffs, of the failure of Black or of the plaintiffs to obtain a permit of the corporation commissioner authorizing said transaction or of the intention of Black or of the plaintiffs to consummate said transaction without obtaining such a permit; and that the knowledge of the plaintiffs with respect to the matter of obtaining a permit was superior to the knowledge possessed by the defendant. The conclusions of law were that no security had been issued or sold by the defendant and that she was entitled to judgment in her favor. Judgment was entered accordingly, and the plaintiffs have appealed.

The appellants contend that the deed by which the respondent conveyed an interest in this land to them constituted a security within the meaning of the Corporate Securities Act, St.1917, p. 673, as amended; that this security was issued by the respondent without a permit; that it was therefore void; that there was a total failure of consideration; and that since they paid the $2,000 to a third party, who in turn paid the same to the respondent, they are entitled to recover the same from her.

It is not necessary to decide whether the deed received by the appellants constituted a security within the meaning of the Corporate Securities Act or whether or not this deed was void as having been issued without a permit. Assuming, but by no means holding, that such were the facts, the decisive question here is whether the court's findings to the effect that the respondent did not enter into any agreement with the plaintiffs, that in so far as she is concerned the transaction was one of sale and purchase between her and Black and that she sold and issued no security to anyone, are supported by the evidence. It appears without conflict that she started out to sell 40 acres of land to Black for $13,500, that this is what she agreed to do and what she understood she was doing, and that she had no dealings with the appellants either directly or through any agent. She informed Black she would sell the land to him only if he produced the money. She was informed that he had brought the money and wanted the land and consented to that proposition. When she was given several deeds to sign she asked about this and was told by Black that he was buying the land but had sold a part of it to others. She acquiesced and the deal was put through on that basis and with that understanding. She never knew what the appellants paid to Black and was not interested in that part of the deal. Black placed the entire $13,500 in escrow and nothing was said about any part thereof having come from the plaintiffs. She approved the escrow instructions which provided that the $13,500 was to be paid to her for the 40 acres in question, the several deeds were issued at the request of Black and for his accommodation, these deeds were delivered into escrow subject to his order, and the one was delivered to the appellants upon his order and for him and not for the respondent. It is conceded that Black was not the agent of either the respondent or the appellants. The court correctly found that there were two separate and distinct transactions and if it could be said that any security was issued within the meaning of the Corporate Securities Act, that security was issued when Black caused the deed to be delivered to the appellants and not when the respondent signed that deed. The material findings are fully supported by the evidence and they, in turn, sustain the judgment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

25 Cal.App.2d 259

PEOPLE v. NOKES.

Cr. 3035.

District Court of Appeal, Second District, Division 1, California.

March 7, 1938.

1. **Criminal law** 🔑1023(10)

An appeal does not lie from a sentence.

2. **Courts** 🔑495

Where accused was convicted and sentenced in United States District Court, was indicted, tried, and convicted in state court a few days later, and at all times was represented by counsel in state court, state court was not without jurisdiction of accused.

3. **Courts** 🔑495

After sentence of accused by the federal court and until the end of his term and discharge, no state court could assume control over his body without the consent of the United States.

4. **Courts** 🔑495

As between the federal and state courts, the one which first acquires jurisdiction and custody of the prisoner may retain it to the exclusion of the other court until the judgment is satisfied, but, by consent of the sovereignty holding jurisdiction of the prisoner, he may be subjected to trial in the courts of the other government by conferring custody of his person for that purpose.

5. **Courts** 🔑495

Under the comity which exists between federal and state courts, upon proper application to the United States authorities, who have custody of a federal prisoner, jurisdiction of the person of one who is charged with another crime may be conferred upon the state court for purpose of trial.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

John R. Nokes was convicted of robbery, and he appeals.

Affirmed. Appeal from sentence dismissed.

John R. Nokes, in pro. per.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

WHITE, Justice.

[1] In an amended indictment containing four counts, the defendant was charged with the crime of robbery. The jury returned separate verdicts finding him guilty upon each of the several counts. A separate judgment was entered upon each conviction. From those judgments, and from an order denying his motion for a new trial, he now appeals. He also appeals from the sentences imposed, but as no appeal lies from the sentences, the attempted appeal therefrom must be dismissed.

Although appellant has failed to file a brief, we are constrained to consider in lieu thereof, because he is now without counsel, his written answer to the order directing that he show cause why his appeal should not be dismissed and which he characterizes as "Motion to Set Aside Judgment and Dismiss Case." From this document we glean that appellant's sole contention is that the state courts, for reasons presently to be stated, are without jurisdiction of his person. The facts upon which appellant bases his contention that the court was without jurisdiction to try him are as follows: He was arraigned in the superior court of Los Angeles county on July 19, 1937. His trial in that court was commenced on August 6, 1937, and continued until August 9, on which date he was convicted as aforesaid. On July 6, 1937, a judgment was rendered against the defendant in the United States

District Court by which he was sentenced to confinement in a federal penitentiary for the term of four years. It appears, however, that at all times, whenever any proceedings were had in connection with the indictment returned in the state court, the defendant was personally present and was at all times represented by counsel, except at the time of his arraignment, upon which latter occasion the court designated the public defender as his counsel, and in whose place and stead private counsel was later substituted.

[2-5] There is no merit in the claim that the court did not acquire jurisdiction of appellant's person. It probably is true, as appellant contends, that after the sentence by the federal court and until the end of his term and discharge, no state court could assume control over his body without the consent of the United States (Ponzi v. Fessenden, 258 U.S. 254, 42 S.Ct. 309, 310, 66 L.Ed. 607, 22 A.L.R. 879); but there is no force in the contention that because he was in the custody of the United States he could not be tried in the state courts. It is true that as between the federal and state courts, the one which first acquires jurisdiction and custody of the prisoner may retain it to the exclusion of the other court until the judgment is satisfied (Marsino v. Hogsett, D.C., 37 F.2d 409, 413); but, by consent of the sovereignty holding jurisdiction of the prisoner, he may be subjected to trial in the courts of the other government by conferring custody of his person for that purpose. People v. South, 122 Cal.App. 505, 509, 10 P.2d 109. It is said in the Ponzi Case, supra, "He [the prisoner] may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. In re Andrews (D.C.) 236 F. 300; United States v. Marrin (D.C.) 227 F. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it. * * * The fact that he may have committed two crimes gives him no immunity from prosecution of either." See, also, Rigor v. State, 101 Md. 465, 61 A. 631, 4 Ann.Cas. 719. Under the comity which exists between federal and state courts, upon proper application to the United States authorities, who have custody of a federal prisoner, jurisdiction of the person of one who is charged with another crime may be conferred upon the state court for the purpose of a trial. When, therefore, appellant was produced in the state court, and was personally present there, with full opportunity to make his defense, jurisdiction of his person was had by the superior court, exactly as if he had been brought before that court by its own officer. People v. Sichofsky, 58 Cal.App. 257, 258, 262, 208 P. 340; Ponzi v. Fessenden, supra.

The appeal from the sentences is dismissed. The judgments and order denying the motion for a new trial are affirmed.

We concur: YORK, P. J.; DORAN, J.

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25 Cal.App.2d 336

PEOPLE v. HALL.

Cr. 1598.

District Court of Appeal, Third District, California.

March 15, 1938.

1. Incest ⇨15

The uncorroborated testimony of the complaining witness may be sufficient to sustain a conviction of incest.

2. Criminal law ⇨741(1), 742(1), 1159(2)

Credibility of the witness and weight of testimony is within the exclusive province of the jury, and what the Court of Appeal would have done sitting as a jury is immaterial, if the story is not so improbable as to stamp it as unbelievable.

3. Criminal law ⇨371(9)

In prosecution for incest, evidence that accused had made first attack on complaining witness, his daughter, eight years before, when she was but 10 years old, was admissible to show an incestuous disposition.

4. Criminal law ⇨371(9)

In prosecution for incest, where evidence was introduced as to first attack on complaining witness by accused, which occurred eight years prior to the act complained of, question of remoteness went to the weight rather than to the competency of the evidence.

5. Criminal law ⇨864

Where jury returned after several hours' deliberation, and court asked them to state how they stood numerically, without indicating their opinions, but foreman said that ten were for guilty and two for acquittal, and judge stated that they could retire for the night or continue to deliberate, court was not guilty of misconduct so as to require reversal.

6. Criminal law ⚿1128(4)

Where affidavit was filed in the Court of Appeal, reciting acts of misconduct of district attorney and jury, but affidavit was not presented to trial court on motion for new trial, Court of Appeal could not take cognizance of the alleged facts therein contained.

7. Incest ⚿14

Evidence sustained conviction of incest.

◆

Appeal from Superior Court, El Dorado County; E. N. Rector, Judge.

Lowell D. Hall was convicted of the crime of incest, and he appeals.

Affirmed.

C. W. Pearson, of Placerville, for appellant.

U. S. Webb, Atty. Gen., and Wilmer M. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was accused and convicted of the crime of incest. Upon this appeal from the judgment and from the order denying the motion for a new trial appellant contends that the evidence does not support the verdict, that the court and district attorney were guilty of misconduct, and that the motion for a new trial should have been granted.

It is not necessary to recite in detail the evidence submitted to the jury. In brief, however, it appears that appellant and his family, consisting of his wife and two children, lived near Diamond Springs in El Dorado county. The complaining witness, a daughter about eighteen years of age, was living at the home of friends in Placerville, where she was attending school, returning home usually about every other week-end. The complaining witness testified that on a Sunday, either February 21st or February 28th, she was at her parents' home; her mother and younger sister had gone to visit an aunt who lived not far away, and the brother was mining in a nearby stream. During the afternoon while she was alone and studying in the living room of the home, appellant entered, seized her, stifled her outcries by tying a dish towel across her mouth, tied her to the bed, and there committed the act complained of. The witness testified that similar acts had been perpetrated upon her by appellant since she was about ten years of age.

It must be admitted that the recital of the method of attack was not altogether convincing, not only to this court, but the trial court seemed to have had some doubt as to the truth of the facts concerning the details. However, the trial court and the jury seem to have had no doubt as to the commission of the act itself. It is more probable that the co-operation of the complaining witness was obtained through fear of the father, and the somewhat improbable recital of the tying and gagging was added by the witness as a justification for her course of conduct in not making an outcry or in not reporting the occurrence immediately after its perpetration.

Appellant, of course, denied the charge, but by his equivocations and attempted explanation of his conduct at the time of the first alleged attack, which he claims he made under the guise of explaining to his daughter the necessity of being able to protect herself against an assault, is almost an admission of guilt on his part. If this occurrence actually took place with his daughter when she was then approximately ten years of age, and having then overcome her physical and moral resistance, the continuation of his course of conduct with her would undoubtedly have become more easy with the passage of time, and it may well have been that at the time here in question the witness did not strenuously resist his approach.

It is true the complaining witness was, on various occasions, subject to spells of unconsciousness and hysteria, and it seems to be the theory of appellant that she was suffering either from some form of delusion or that she fabricated the story of the course of conduct complained of, but no motive is shown for the complaining witness to have made a groundless charge against her father, nor does there appear any malice or animosity on the part of the daughter toward him, nor does any reason appear for such a statement to have been made unless based upon fact. Her school grades through grammar school and up to the present year in high school show an intellectual standard well above the average.

[1, 2] Appellant urges the testimony of the witness was uncorroborated, but the testimony of several medical witnesses who examined the complaining witness, established the physical fact of sexual experience. Furthermore, uncorroborated testimony of the witness may be sufficient to sustain this verdict. People v. Gomez, 118 Cal. 326, 50 P. 427; People v. Rabbit, 64 Cal.App. 264, 221 P. 391. It is often said that the credibility of the witness and the weight of the testimony is within the exclusive province of the jury. If the court and jury believed the evidence of the daughter, her testimony of the acts committed by the father are sufficient to sustain the verdict. What this court would have done sitting as a jury is immaterial, if the story is not so improbable as to stamp it as unbelievable.

[3, 4] We find no merit in the specifications of misconduct on the part of the district attorney or of the court. It is charged the district attorney was guilty of misconduct in introducing evidence of the conduct of the appellant toward the complaining witness some eight years before the commission of the act for which he was then on trial. Such testimony, however, was admissible to show an incestuous disposition. People v. Fuhrman, 130 Cal. App. 267, 19 P.2d 821; People v. Koller, 142 Cal. 621, 76 P. 500; People v. Foster, 117 Cal.App. 439, 4 P.2d 173. Furthermore, the question of remoteness goes to the weight rather than to the competency of the testimony. People v. Piercy, 16 Cal.App. 13, 116 P. 322; People v. Bolton, 215 Cal. 12, 8 P.2d 116.

[5] The misconduct of the court is predicated upon certain statements made to the court by the jury when they returned after some hours of deliberation. At that time the court, in order to determine whether or not they should be returned for further deliberation, asked them to state how they stood numerically, without indicating their opinions. In spite of that statement the foreman stated that ten were voting for guilty and two for acquittal. The jury did not say that they felt they would be unable to reach a verdict if they had further time for consideration, and at that time the judge told them that beds would be provided and they could retire for the night if they desired, or they could continue to deliberate. That was at 10:05 o'clock p. m., and at 11:30 o'clock p. m., the jury returned with a verdict of guilty.

We do not find anything that the court said that could be construed as directing the jury to find a verdict of conviction or any attempt to compel them to change their mind, or to agree one way or the other in the matter.

[6] An affidavit was filed in this court in which it is recited that during the course of the trial the district attorney was seen in conversation with several of the jurors, and in another affidavit it was recited that during the course of the trial and while the jury were being taken out to breakfast they were not kept together but allowed to separate. It does not appear why these affidavits were not presented to the trial court upon the motion for a new trial, the motion having been made on the first of October, and the affidavits bearing date of October 6th. We cannot now, under those circumstances, take cognizance of the alleged facts therein contained.

[7] In a case of this nature this court appreciates the responsibility of the reviewing court, and also of the fact that jurors sometimes are swayed by the character of such a charge, as here presented, and are perhaps thereby more inclined to convict than they otherwise might be. For that reason we have carefully read and considered the entire record before us. After such examination, however, we believe that there is sufficient evidence to justify the verdict found.

The judgment and order from which this appeal is taken are affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

25 Cal.App.2d 279

PEOPLE v. SPIVEY.

Cr. 1588.

District Court of Appeal, Third District, California.

March 8, 1938.

1. Judgment 🔑518

A motion to annul a judgment of conviction is a collateral attack upon the judgment, and, unless the judgment upon its face shows that it is void, the attack must fail.

2. Criminal law 🔑1134(8)

In passing upon defendant's appeal from an order denying defendant's motion to set aside a judgment theretofore rendered against defendant following trial in which defendant was convicted of a felony and charged with prior convictions, reviewing court was confined to an examination of the judgment roll alone.

3. Judgment 🔑485

A collateral attack upon a judgment must fail, unless the judgment upon its face shows that it is void.

4. Judgment 🔑501

A collateral attack upon a judgment of conviction for a felony with prior convictions, on the ground that accused was not allowed 20 peremptory challenges, would not lie where judgment was regular upon its face, irrespective of errors which might have been corrected on appeal from judgment. Pen.Code, § 1070 and § 644, as amended by St.1935, p. 1699.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Wilmer C. Spivey was convicted on an information charging him with three separate robberies and also with three prior convictions for which he had served sentences, and, from an order denying a motion to annul and set aside the judgment of conviction, he appeals.

Affirmed.

E. H. Zion, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

This cause is before us upon an appeal from an order of the superior court of Stanislaus county denying defendant's motion to annul and set aside a judgment theretofore rendered against the defendant, following a trial in which the defendant was convicted on an information charging him with three separate robberies, and also with three prior convictions for which the defendant served sentences.

The grounds of the appeal and the reasons advanced as to why the judgment of conviction should be annulled and set aside is based upon the allegation that the defendant, in the trial referred to, was allowed only 10 peremptory challenges instead of 20. In this behalf the defendant calls our attention to section 1070 of the Penal Code, which provides, if the offense charged be punishable with death or imprisonment for life, the defendant is entitled to 20 peremptory challenges. When the defendant is on trial for any other offense, 10 challenges only are allowable.

Section 644 of the Penal Code, as amended by St.1935, p. 1699, relative to habitual criminals, allows a penalty of life imprisonment where one is convicted of offenses charging priors, as in the instant case.

A number of cases are cited to the effect that under the circumstances surrounding and attendant upon the trial of the defendant on the charges of robbery, as referred to, holding that the defendant should have been allowed 20 peremptory challenges.

[1-4] Whether the trial court did or did not err in refusing to allow the defendant more than 10 peremptory challenges is really not before us for decision. In the cases cited, beginning with People v. O'Connor, 81 Cal.App. 506, 254 P. 630; People v. Hall, 199 Cal. 451, 249 P. 859; People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Wismer, 58 Cal.App. 679, 209 P. 259; People v. Walker, 132 Cal. 137, 64 P. 133; People v. Stratton, 133 Cal.App. 309, 24 P.2d 174, and other cases which we need not cite, the question relative to the error of the court in allowing or refusing to allow peremptory challenges was presented upon appeals. In all of those cases the court was at liberty to examine the record of the trial in passing upon the alleged error or errors of the trial courts. Such is not the state of the record before us. In passing upon the defendant's motion we are confined to an examination of the judgment roll alone. This examination reveals that the judgment is absolutely regular, and, therefore, irrespective of any errors which might have been examined and corrected upon appeal, are immaterial.

This proceeding is a collateral attack upon the judgment, and, unless the judgment upon its face shows that it is void, the attack must fail. 15 Cal.Jur., p. 59, § 145.

The order denying the defendant's motion to annul and set aside the judgment of conviction against him is affirmed.

* * *

ST. CLAIR v. BULLOCK, Superior Court Judge.*

Civ. 11765.

District Court of Appeal, Second District, Division 2, California.

March 15, 1938.

Rehearing Denied April 5, 1938.

Hearing Granted by Supreme Court May 12, 1938.

1. **Exceptions bill of 🔑45**

The duty of the trial court is to settle a bill of exceptions and not to make one.

2. **Exceptions, bill of 🔑60(1)**

A motion and order to strike a proposed bill of exceptions will lie in a proper case.

3. **Exceptions, bill of 🔑53(5)**

Where a proposed bill of exceptions is lacking in the very essentials of a bill of exceptions, a writ of mandate will not issue to compel settlement of the bill.

4. **Exceptions, bill of 🔑53(7)**

On petition for writ of mandate to compel trial judge to settle a proposed bill of exceptions, burden was on petitioner to show that there was no evidence to support court's implied findings that the proposed bill was false and merely sham and that court violated its discretion in striking it.

5. **Exceptions, bill of 🔑51**

Where, after trial court's consideration of proposed bill of exceptions, bill was deemed so unfair and lacking its essentials as to render correction impossible, was false in at least one particular, and incomplete in many others, trial judge was not required to settle the proposed bill of exceptions.

◆

Petition by Cordelia St. Clair for a writ of mandate to command Georgia P. Bullock, Judge of the Superior Court of the State of California in and for the County of Los Angeles, to settle a proposed bill of exceptions which was served and filed by petitioner in an action by the petitioner against Malcolm St. Clair in the Superior Court in and for the County of Los Angeles.

Alternative writ discharged and peremptory writ denied.

Henry E. Phister, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy, and W. I. Gilbert, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is a petition for a writ of mandate to be issued against the superior court of Los Angeles county, Georgia P. Bullock, judge presiding, respondent, to command the respondent to settle a proposed bill of exceptions served and filed by petitioner.

The petitioner is plaintiff in that certain action in the superior court of Los Angeles county entitled Cordelia St. Clair v. Malcolm St. Clair, No. D 124338. The plaintiff served and filed her proposed bill of exceptions to certain proceedings which had transpired in said court, and the defendant also served and filed his proposed amendments thereto. Thereafter the petitioner herein, plaintiff in said action, served and filed her notice of motion to strike the defendant's proposed amendments, and thereafter the defendant served and filed his notice of motion to strike plaintiff's proposed bill of exceptions. Thereafter these motions came on for hearing, and the court made its order as follows: "Motion of defendant to strike proposed bill of exceptions of plaintiff and motion of plaintiff to strike proposed amendments of defendant to plaintiff's bill of exceptions come on for hearing; H. E. Phister appearing as attorney for plaintiff and W. I. Gilbert for defendant. (No reporter.) After argument and consideration by the court the motion of defendant to strike is granted and motion of plaintiff to strike is denied." Petitioner claims that by said order she was deprived of her right of appeal.

To this petition the respondent answers that, "after considering all of said motions, the proposed amendments to said proposed bill of exceptions, and the stenographic report of said proceedings, together with the numerous exhibits submitted to respondent at the trial, she concluded that said proposed bill of exceptions did not contain a full and fair presentation of the evidence relating to the matters specified in said proposed bill of exceptions as errors, and that said proposed bill of exceptions was partial, meager, unfair, and a pretense and a sham, and that in order to present a fair bill of exceptions, it is the belief of respondent that either respondent or the defendant therein would be required to rewrite said bill of exceptions."

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*For subsequent opinion see 85 P.2d 867.

Respondent in her answer cites numerous illustrations of the fact that the petitioner's proposed bill of exceptions does not contain the essentials of a proposed bill of exceptions and cannot be regarded as a proposed bill of exceptions and that it is a sham, and respondent says that, if she were required to order amendment, she would in fact be required in effect to assume the burden of preparing a new bill of exceptions for the petitioner herein.

[1] The duty of the trial court is to settle a bill of exceptions and not to make one. Pacific Land Ass'n v. Hunt, 105 Cal. 202, 38 P. 635; Hearst v. Dennison, 72 Cal. 227, 13 P. 628.

[2, 3] A motion and order to strike a proposed bill of exceptions will lie in a proper case. Dainty Pretzel Co. v. Superior Court, 7 Cal.App.2d 437, 45 P.2d 817. Where a proposed bill of exceptions is lacking in the very essentials of a bill of exceptions, the writ of mandate will not issue. Fairbanks, Morse & Co. v. Superior Court, 90 Cal.App. 410, 265 P. 992.

[4, 5] This is not a case where a court has arbitrarily refused to settle a proposed bill of exceptions, but rather one where, after consideration thereof, the same has been deemed so unfair and so lacking in its essentials as to render correction by amendment impossible. The respondent has furnished this court with a transcript which shows that the proposed bill of exceptions is false in at least one particular and that it is incomplete in many particulars. The burden is upon the petitioner to show that there is no evidence to support the court's implied finding that the proposed bill is false and merely a sham or pretense and an imposition upon the court, and that the court violated its discretion in striking it, and we have no such showing here. On the contrary, there is substantial evidence to show the falsity of the bill of exceptions and its incompleteness, and to show that the respondent would be required to prepare an entirely new bill in order to make the bill reflect fairly the evidence relating to the errors assigned by the petitioner.

The alternative writ is discharged and the peremptory writ denied.

We concur: WOOD, J., McCOMB, J.

PEOPLE v. LEWIS. *

Cr. 3038.

District Court of Appeal, Second District, Division 1, California.

March 9, 1938.

Hearing Granted by Supreme Court April 8, 1938.

1. Constitutional law ⇨48

A statute will not be annulled as contrary to the Constitution unless it is clearly and certainly opposed thereto, but, when a definite and substantial conflict appears, the court must condemn the statute.

2. Statutes ⇨73(2)

A statute limiting punishment for a misdemeanor to one year except in counties maintaining a penal farm or state institution for long-term misdemeanants was invalid to extent that it was violative of constitutional requirement that laws of a general nature have a uniform operation Pen.Code, § 19a, added St.1933, p. 2217; Const. art. 1, § 11; art. 4, § 25.

3. Statutes ⇨64(6)

Under statute providing a maximum punishment of two years for offense of contributing to delinquency of a minor, a sentence of imprisonment for two years was authorized, notwithstanding statute limiting punishment for misdemeanors to one year except in counties maintaining a penal farm or state institution for long-term misdemeanants, since limitation of latter statute was void because not of uniform operation. Gen.Laws 1931, Act 3966, § 21; Pen.Code, § 19a, added St.1933, p. 2217; Const. art. 1, § 11; art. 4, § 25.

4. Criminal law ⇨1023(10)

An appeal does not lie from a sentence.

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*For subsequent opinion see 89 P.2d 388.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Hoyt Lewis was convicted of contributing to the delinquency of a minor, and he appeals from the judgment and sentence.

Judgment affirmed; attempted appeal from sentence dismissed.

Gladys Towles Root and Morris Lavine, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant was charged, in an amended information, with contributing to the delinquency of a minor, a misdemeanor. Said defendant entered a plea of guilty to the charge, and, his application for probation being denied, was sentenced to imprisonment in the county jail for a period of two years. This appeal is from the judgment and the sentence.

Appellant contends that the "sentence imposed was in excess of the time as prescribed by law, and was therefore contrary to the law."

The offense of contributing to the delinquency of a minor, which is, by section 21 of the Juvenile Court Act (Act 3966, Deering's Gen.Laws) declared to be a misdemeanor, provides as a maximum punishment, "a fine not exceeding one thousand dollars, or by imprisonment in the county jail for not more than two years, or by both such fine and imprisonment." Appellant, however, relies upon section 19a of the Penal Code, enacted subsequently, St.1933, p. 2217, which provides that "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year. If, however, any county, or group of counties together, should establish a penal farm, or if there be established a State institution for long-term misdemeanants, then commitment to such penal farms or such State institutions shall be for such period as the court may order within the limits prescribed by statute for the offense."

Respondent asserts, in substance, that section 19a is unconstitutional and void for the reason that the maximum period of confinement prescribed therein is not fixed and definite under all circumstances; that it does not fix the same maximum punishment for the same offense throughout the state; that the State Constitution provides that "All laws of a general nature shall have a uniform operation," section 11, art. 1; and that said Constitution further provides that "The legislature shall not pass local or special laws * * * for the punishment of crimes and misdemeanors," and shall not pass local or special laws "In all other cases where a general law can be made applicable," section 25, art. 4.

[1-3] Respondent's contention must be sustained. Obviously that portion of section 19a of the Penal Code providing for a different punishment in counties where a penal farm is established is repugnant to the Constitution. Such provision is neither general in nature nor uniform in operation; to the contrary, it not only lacks those essentials, but is conditional and therefore indefinite. It not only permits but actually creates a different punishment for the same offense. Inasmuch as the limitation of one year is provisional and conditional and clearly intended to operate, if valid, subject to the condition therein provided, the invalidity of the condition, as above pointed out, necessarily invalidates the limitation. It is elementary that the courts will not annul, as contrary to the Constitution, a statute unless it can be said of the statute that it clearly and certainly is opposed to the Constitution. If there is doubt, it is the general rule that the will of the Legislature will be sustained. But when a definite and substantial conflict with the Constitution appears, that it is the court's plain duty to condemn the statute, requires no citation of authority. For the foregoing reasons it is evident that the provisions of section 19a of the Penal Code, above quoted, are invalid, and that, therefore, the judgment pronounced conforms to the law.

[4] The judgment appealed from is affirmed. Since no appeal lies from a sentence, the attempted appeal therefrom is dismissed.

We concur: YORK, P. J.; WHITE, J.

PEOPLE v. YALO.*

Cr. 3055.

District Court of Appeal, Second District, Division 1, California.

March 9, 1938.

Hearing Granted by Supreme Court April 8, 1938.

1. Infants ⚷20

A sentence of imprisonment for 1½ years for contributing to the delinquency of a minor was authorized where statute purporting to limit punishment for a misdemeanor to 1 year except in counties maintaining a penal farm or state institution for longterm misdemeanants was invalid. Pen. Code, § 19a, added by St.1933, p. 2217.

2. Criminal law ⚷1023(10)

An appeal does not lie from a sentence.

◆

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Lucelo Yalo was convicted of contributing to the delinquency of a minor, and he appeals from the judgment and sentence.

Judgment affirmed; attempted appeal from sentence dismissed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant herein pleaded guilty to the charge of contributing to the delinquency of a minor, and, his application for probation being denied, was sentenced to imprisonment in the county jail for a period of 1½ years. This appeal is from the judgment and sentence, appellant contending that the provision of section 19a of the Penal Code, added by St.1933, p. 2217, limiting the period of sentence to 1 year, is controlling.

[1, 2] The same question was raised and disposed of in the opinion filed this day in Re People v. William Hoyt Lewis, Cal. App., 77 P.2d 249; and, for the same reasons set forth in said opinion, the judgment appealed from herein is affirmed. Since no appeal lies from a sentence, the attempted appeal therefrom is dismissed.

We concur: YORK, P. J.; WHITE, J.

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*For subsequent opinion see 89 P.2d 391.

PEOPLE v. MEGUGORAC.†

Cr. 3073.

District Court of Appeal, Second District, Division 2, California.

March 8, 1938.

Hearing Granted by Supreme Court April 7, 1938.

1. Criminal law ⚷1069(6)

Where defendant fails to comply with court rules requiring the filing within five days after giving notice of appeal of an application stating general grounds of appeal and points upon which defendant relies, and designating portions of reporter's notes necessary to be transcribed, reviewing court is without jurisdiction to consider appeal. Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

2. Criminal law ⚷1069(6)

Where defendant on appeal failed to comply with court rules relative to filing application designating portions of phonographic reporter's notes necessary to be transcribed on appeal, in that no application designating portions of phonographic reporter's notes necessary to be transcribed was filed until seventeen days subsequent to notice of appeal, appeal would be dismissed. Rules of Supreme Court and District Courts of Appeal, rule 2, § 7.

WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Nick Megugorac was convicted of murder in the first degree, and he appeals. On motion of the People to dismiss the appeal.

Appeal dismissed.

Peter T. Rice, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McCOMB, Justice.

This is a motion by respondent to dismiss the appeal on the ground that appellant failed to file within five days after giving notice of appeal with the clerk and present to the trial court an application designating the portions of the phonographic reporter's notes necessary to be transcribed to fairly present the points he desired to urge on appeal, as required by section 7, rule II, Rules for the Supreme Court and District Courts of Appeal, 213 Cal. xxxix.

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† For subsequent opinion see 82 P.2d 1108.

The record disclosed that on December 20, 1937, appellant gave oral notice of appeal from a judgment pronouncing him guilty of murder in the first degree and from an order denying his motion for a new trial. No application designating the portions of the phonographic reporter's notes necessary to be transcribed was filed until January 6, 1938, seventeen days subsequent to the notice of appeal.

[1] This is the sole question presented for determination: *Does a failure to file with the clerk and present an application to the trial court designating the portions of the phonographic reporter's notes necessary to be transcribed on appeal within the time prescribed in section 7 of rule II, supra, deprive the appellate court of jurisdiction to hear the appeal?*

This question must be answered in the affirmative. Compliance with the requirement of section 7, rule II, as above set forth, is a jurisdictional prerequisite to the right of appellant to have his case heard by the appellate court on its merits. The rule is thus stated in People v. Lewis, 219 Cal. 410, 414, 27 P.2d 73, 74, by Mr. Justice Seawell: "Not only must the notice of appeal be filed in time, but a defendant who appeals from a judgment of conviction must, within five days after giving notice of appeal, file with the clerk and present to the trial court an application stating in general terms the grounds of his appeal and the points upon which he relies, *and must designate the portions of the reporter's notes necessary to be transcribed. Where the defendant fails to conform with this rule (rule II, § 7, Rules of Supreme Court and District Courts of Appeal), the appellate court is without jurisdiction to consider his appeal* [citing cases]." (Italics ours.)

[2] Therefore, since appellant has failed to comply with the provisions of section 7, rule II, mentioned above, the appeal is dismissed.

I concur: CRAIL, P. J.

WOOD, Justice.

I dissent. The statement of the grounds of the appeal was filed December 27, 1937, within the time set by the rule, the two days immediately preceding having been holidays. Section 7 of rule II provides that the phonographic reporter shall file with the clerk a transcription of his notes within twenty days after the filing of the application. Section 8 of rule II provides that proposed corrections of the transcription may be made within five days "after the filing of the same with the clerk by the reporter." This section also provides for a hearing on the proposed corrections and a certification by the judge. Thereafter the certified transcript shall be transmitted to the court to which the appeal was taken. In the case before us the reporter's transcript was certified by the reporter on January 10, 1938, served upon the district attorney on January 10, 1938, and upon counsel for appellant on January 12, 1938. It was certified by the judge on January 18, 1938, and filed in this court on January 24, 1938. Appellant omitted to designate on December 27, 1937, the portions of the phonographic reporter's notes which should be transcribed to fairly present the points relied upon. The designation was supplied on January 6, 1938, at which time the appellant requested a transcription of all of the evidence including the objections of counsel and rulings of the court thereon.

Section 7 of rule II provides: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, or from an order made after judgment, or upon an appeal by the people from an order granting a new trial, or from an order setting aside an indictment, information, or accusation, or from an order made after judgment, the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent." The appellant did in fact comply with that part of the rule requiring the filing of a statement of the grounds of the appeal, but delayed complying with the portion of the rule requiring a designation of the portions of the reporter's notes which should be transcribed. In People

v. Bryant, 207 Cal. 450, 278 P. 1025, the appellant designated the portions of the phonographic reporter's notes to be transcribed, together with an enumeration of various matters required on the appeal such as copies of the indictment and instructions to the jury, but did not state the grounds of the appeal. The court held that the appellant had made a substantial compliance with section 1247 of the Penal Code as then in force, which contained provisions substantially the same as those contained in section 7 of rule II. It was pointed out that the provision was for the benefit of the appellate court to aid it in deciding the points raised upon appeal, and that no one else was prejudiced by the omission on the part of the appellant. In the case now before us it is manifest that no one has been prejudiced, and that the delay in the designation of the portions of the reporter's notes to be transcribed has not affected the substantial rights of any one. As said in the Bryant Case, "It is the policy of this court, of course, to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities." It is my opinion that the appellant has made substantial compliance with rule II; that this court has jurisdiction to hear the appeal on the merits and should do so in the interest of justice.

MOODY v. PROVIDENT IRR. DIST.*

Civ. 5905.

District Court of Appeal, Third District, California.

March 11, 1938.

As Amended April 2, 1938.

Rehearing Denied April 9, 1938.

Hearing Granted by Supreme Court May 9, 1938.

1. Waters and water courses 🔑230(8)

The entry of a money judgment against an irrigation district does not give bondholder any additional remedies in seeking to enforce payment on matured bonds and matured coupons, but only remedy available to bondholder is to enforce by mandamus compliance by officers of district with provisions of statute for raising money with which to make payment of bonds and coupons. St.1897, p. 254, as amended.

2. Waters and water courses 🔑224

An irrigation district is a governmental agency and has such powers, and is subject to such liabilities, as are expressly provided by statute. St.1897, p. 254, as amended.

3. Waters and water courses 🔑230(2)

The law in force at the time bonds and coupons of irrigation district are issued become part of contract. St.1897, p. 254, as amended.

4. Waters and water courses 🔑216

No constitutional prohibition exists against enactment of statute providing for agreement between irrigation district and holder of irrigation district bonds specifying that bonds and coupons shall be paid as soon as money is available therefor and promising to pay bondholder rate of interest which would be payable on money judgment. St.1931, p. 172, § 52.

5. Waters and water courses 🔑230(8)

Under California Irrigation District Act, only remedy by holder of bonds issued by district to collect matured bonds is to compel officers of district to take such proceedings as are specified in the act to obtain revenues with which to pay bonds and coupons. St.1897, p. 254, as amended.

6. Execution 🔑22
Judgment 🔑777

The property of an irrigation district constitutes a public trust and is held by the district for public use, and hence is not subject to levy and sale by execution by creditors of district, and money judgment does not constitute lien on property lying within district. St.1897, p. 254, as amended.

7. Limitation of actions 🔑145(3)

Under Irrigation District Act, registering of irrigation district bonds and coupons by district on presentation when there was insufficient money for payment thereof as provided by statute and acceptance thereof by bondholder constituted new agreement and tolled statute of limitations until there was sufficient money in hands of treasury of district with which to pay bonds and notice had been given as provided by statute. St. 1931, p. 172, § 52.

8. Waters and water courses 🔑230(8)

The holder of matured bonds and interest coupons of irrigation district was not entitled to judgment on bond and coupons where, upon presentation thereof, treasurer of district had registered bonds and indorsed agreement thereon that they should bear interest at 7% until funds were available for their payment, since holder was put in same position by indorsement as he would have been by obtaining a money judgment. St.1917, p. 764, § 33; St.1931, p. 172, § 52; St.1909, p. 1075, § 29.

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*For subsequent opinion see 85 P.2d 128.

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Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Gilbert Moody against the Provident Irrigation District to recover judgment on matured bonds and coupons issued by the defendant. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. Coburn Cook, of Turlock, for appellant.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff to recover a money judgment against the defendant upon certain of its matured bonds and coupons issued on the 5th day of August, 1918, and owned by the plaintiff. The cause was tried before the court without a jury, and resulted in a judgment favorable to the defendant. From this judgment the plaintiff appeals.

The record shows that the Provident Irrigation District was organized on the 27th day of April, 1918, and ever since said date has been and now is a duly existing irrigation district.

On the 15th day of August, 1918, the district issued certain bonds in the aggregate sum of $1,000,000, represented by 1,000 bonds in the denomination of $1,000 each, payable serially commencing on the 15th day of August, 1930, and thereafter, on the 5th day of August of each year until 1940. The bonds provided for the payment of interest at the rate of 6 per cent. per annum, payable semiannually. The bonds had coupons attached specifying that the district would pay to the bearer, at the office of the treasurer of the district, in the city of Willows, county of Glenn, Cal., a sum of money representing six months' interest.

The plaintiff is the owner of three matured and unpaid bonds, and also is the owner of matured and unpaid interest coupons of the face value of $502.50. All of the bonds and coupons owned by the plaintiff, after date of maturity and prior to the beginning of this action, were presented to the treasurer of the district for payment. There being no funds in the hands of the treasurer for the payment of either the bonds or the interest coupons, the treasurer indorsed thereon that funds were not available for payment, and that the bonds and coupons should bear interest at the rate of 7 per cent. per annum from the date of presentation until notice is given that funds are available for their payment. After making this indorsement on the bonds and coupons, the bonds and coupons were returned to the plaintiff.

The record shows that annual assessments for the payment of bonds and coupons have been duly and regularly levied by the district, but the assessments have not been paid by the landowners, and that there are not now, and have not been, any funds in either the bond or interest funds of the district with which to pay any of the plaintiff's bonds or coupons since their original due dates.

The record shows that there has been a general default in the payment of principal and interest on the bonds of the district since January 1, 1931.

Where an action is begun to obtain a money judgment against the district for and on account of the unpaid bonds and coupons, it is contended by the respondent that the presentation by the plaintiff of his bonds and coupons at a time when there was no money in the bond or interest funds of the district for their payment, the registration and indorsement thereof by the treasurer of the district at the request of the plaintiff agreeing to pay the plaintiff 7 per cent. interest from date of presentation until notice should be given that funds were available for payment, constituted a new agreement between the plaintiff and the district, under which the plaintiff's bonds and coupons would be exempt from the running of the statute of limitations until money sufficient to make payment thereof had come into the hands of the treasurer and notice given that money was available for the payment of the bonds; that the action by the plaintiff was either premature or an idle proceeding.

It is further contended by the respondent that having the bonds and coupons registered and the district endorsement made by the treasurer as authorized by the provisions of section 52 of the California Irrigation District Act, St.1897, p. 272, as amended in 1919, St.1919, p. 667, increasing the interest from 6 per cent. to 7 per cent., and specifying that the bonds and coupons should thereafter bear interest at the rate of 7 per cent. until funds were available for their payment, and the acceptance of the same by the plaintiff, constituted a new agreement. The consideration moving to the plaintiff would be the increased interest and the waiving on the part of the district of the right to plead the statute of limitations, thus, in any event rendering the entering of a money judgment against the district on the bonds and coupons an unnecessary and idle procedure.

[1] It is clear that while it has been held in a number of cases prior to the amendment of section 52, supra, that a money judgment was proper to be entered against the district, and also necessary to prevent the bar of the statute after the lapse of four years, it is likewise clear that the entering of a money judgment against the district does not give to a bondholder any additional remedies in seeking to enforce payment on matured bonds and matured coupons. The only remedy available to a bondholder is to enforce, by mandamus proceedings, compliance by officers of the district with the provisions contained in the California Irrigation District Act, St.1897, p. 254, as amended, for raising money with which to make payment of bonds and coupons.

The prayer of the complaint in this action asks for judgment in the amount of the principal sum of the bonds and coupons, matured and unpaid, and interest thereon at the rate of 7 per cent. per annum. The indorsement on the bonds and coupons by the treasurer of the district binds the district to pay that rate of interest whenever funds are available for such purpose. Thus, the financial interests of the plaintiff are rendered exactly the same by the indorsement as it would be after obtaining a money judgment. Again, it is thus shown that no change could be effected concerning the financial interests of the plaintiff by having a judgment entered in his favor as prayed for.

The first paragraph of section 52, supra, as amended by St.1931, p. 172, reads as follows: "Upon presentation of any matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond interest fund. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation."

[2-4] It is settled law that an irrigation district is a governmental agency, and that it has such powers, and is subject to such liabilities as are expressly provided by statute. Whiteman v. Irrigation District, 60 Cal.App. 234, 212 P. 706; Selby v. Oakdale Irrigation District, 140 Cal.App. 171, 35 P.2d 125; Meyerfeld v. South San Joaquin Irr. Co., 3 Cal.2d 409, 45 P.2d 321. Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district become a part of the contract. Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972, and cases there cited. These cases, however, do not limit the power of the Legislature to provide for a subsequent method of payment which does not impair the existing rights of the bondholder; nor does it prevent the Legislature providing that the district and the bondholder may enter into a subsequent agreement relative to the bonds issued by the district and owned by the bondholder. In other words, there is no constitutional prohibition against a subsequent agreement being entered into between a bondholder and the district, specifying that the bonds and coupons shall be paid as soon as money is available therefor, and promising to pay the bondholder the same rate of interest which he would receive if a money judgment were entered on the matured bonds and coupons. There being, as we have stated, no change in the substantive rights of the bondholder relative to enforcing, such proceedings as the law specifies may be taken by the officers of the district in an effort to obtain money with which to pay the bonds.

[5] Section 33 of the California Irrigation District Act, St.1897, p. 265, as amended by St.1917, p. 764, states that the bonds and interest thereon shall be paid from revenues derived from annual assessments upon the land within the district, and that all the lands in the district shall

be and remain liable to be assessed for such payments. The different sections of the act also empower and direct the officers of the district to make sales of land where the assessments have not been paid. A reading of the different sections of the California Irrigation District Act leads to the conclusion that the only remedy of the bondholder, at least while the lands within the district are held in private ownership, is to compel the officers of the district to take such proceedings as specified in the act to obtain revenues with which to pay bonds and coupons, and that no execution can run against the property of the district. Thus again, rights of the bondholder cannot in any way be advanced by the entry of a money judgment. All the proceedings that may be instituted by the bondholder can be taken without the entry of a money judgment. The money judgment does not constitute a lien upon any of the lands lying within the district.

[6] That the annual assessments and the sale of lands upon which the assessments are not paid may never realize sufficient money to pay the indebtedness of the district, is entirely beside the question. The property of the district, so far as it owns any property, constitutes a public trust and is held by the district for a public use, and, therefore, is not subject to levy and sale upon execution by a creditor of the district. Tulare Irr. District v. Collins, 154 Cal. 440, 97 P. 1124; section 29, California Irrigation District Act, St.1897, p. 263, as amended by St.1909, p. 1075.

[7] That the statute of limitations, under the circumstances disclosed by this case, could never be pleaded by the district until it had the money in its possession to pay the bonds belonging to the plaintiff, and had given notice, is supported by the case of Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646, where it was held that when a city issues bonds with interest coupons, payable as fast as money should come into the treasury from special sources designated in the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act.

That the registering of the bonds and coupons, as provided by section 52, supra, constituted a new agreement and tolled the statute of limitations until there was sufficient money in the hands of the treasury of the district with which to pay the same, and notice given as provided by the California Irrigation District Act, is upheld by the United States Supreme Court in the case of Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 364, 33 L.Ed. 766. The opinion in this case, after holding that a transaction similar to that which took place between the plaintiff and the district constituted the creation of a new agreement, used the following language: "The cases of Underhill v. Sonora, 17 Cal. 172, and Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646, are in point. In the former case the court observes that 'the legislative acts then recognized the debt, and made provision for its payment. This is enough to withdraw the case from the operation of the statute. It is equivalent to a trust-deed, by the state, setting apart property out of which the money due was to be paid at a given time, if not sooner paid, upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute simply because the creditor waited after this for his money.' In the other case it was held that, 'where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act.'"

While the question has been presented as to whether matured bonds and matured coupons, without taking the proceedings specified in section 52, supra, would or would not bear interest, a ruling as to such question is not necessary to a decision in this cause. However, we may cite two cases from the supreme court of Colorado, to the effect that such bonds and coupons do not bear interest, to wit: In re Green City Irr. Dist., Heath v. Green City Irr. Dist., 91 Colo. 202, 13 P.2d 1113, and North Denver Municipal Irr. Dist. v. Heath, reported in 91 Colo. 210, 13 P.2d 1116.

[8] While the briefs presented in this cause cite a number of cases to which we have made no reference, we think what we have set forth determinative of the issues involved. The proceeding being a purely idle act, and the entry of a money judgment by the trial court af-

fording the plaintiff no additional rights or remedies, we think the court was correct in holding in substance that it should not be burdened with proceedings which would avail the plaintiff nothing.

We also hold that the statute of limitations in this case is tolled and cannot be pleaded by the district as a defense until the statutory period elapses after funds are in the hands of the treasurer of the district with which to make payment, and notice thereof given.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 281

VERNON v. RAPPAPORT, Court Reporter.

Civ. 11629.

District Court of Appeal, Second District, Division 1, California.

March 9, 1938.

1. Criminal law 🔑997

Though the law provides for various motions after verdict, each of such remedies may be availed of but once, and, when the court has denied such motion, the right to make it and right of the same court to rule upon such motion has been exercised and exhausted, even though no appeal is taken from the ruling on the motion; it being immaterial that second motion is based on other or additional grounds.

2. Criminal law 🔑997

Petition for writ of error coram nobis, made six years after conviction and nearly a year following decision denying petition for writ of error coram nobis praying that guilty plea be vacated, which was in substance identical with first petition for writ of error coram nobis, would be denied, since to permit an appeal to be taken from the order denying the latter petition would be allowing two appeals from the same ruling which would extend the time for appeal contrary to the intent of the statute.

3. Criminal law 🔑661

Under Penal Code, substantial rights are not denied where person charged has full and fair opportunity to invoke every privilege or right which the law accords to an accused. Pen.Code, § 1237, subd. 3.

4. Criminal law 🔑1023(12)

Under Penal Code, person convicted of crime cannot assign as grounds for separate appeals specific questions which he might have presented upon a former appeal, and which he raised on separate appeals under guise that each denial constituted an order made after judgment affecting substantial rights of parties within statute permitting appeal therefrom. Pen.Code, § 1237, subd. 3.

◆

Petition by Thomas A. Vernon for a writ of mandate to be directed to Samuel Rappaport, an official reporter of the Superior Court of Los Angeles County, requiring him to prepare a transcript of his notes for use on appeal.

Writ denied.

Rosen & Wolpin, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

Petitioner seeks by writ of mandate to compel respondent official reporter of the superior court of Los Angeles county to transcribe and file with the clerk of said court such portion of his stenographic notes as requested by petitioner, following denial by said court of a petition for a writ of error coram nobis.

The record before us indicates that on December 12, 1929, an indictment was returned by the grand jury in the superior court of Los Angeles county, charging the defendant with the crimes of "wrecking a train" and "robbery"; and the indictment also contained an allegation that theretofore, on separate respective dates, and at different places he had suffered five convictions for the commission by him of different and various felonies. On December 13, 1929, the defendant therein pleaded guilty to these charges and at the same time admitted that he had suffered each of such five convictions. The court thereupon adjudged him an habitual criminal, and he was sentenced to the state prison for the term prescribed by law. About four years later, petitioner made a motion to set aside the judgment on the ground that the court had no jurisdiction to pronounce the same. This motion was denied, and an appeal taken therefrom was dismissed. Subsequently, on June 20, 1934, he presented to the trial court his application for a "writ of error coram nobis," and in substance based the same upon the ground that his plea of "guilty" to the aforesaid charges was induced solely by coercion and duress practiced upon him by arresting and investigating officers. With such application he also presented a "confession" claimed to have been made by a fellow prisoner of the defendant, who was also serving a term of imprisonment in the state penitentiary in which the defendant was confined, and which "confession" was to the effect that said fellow prisoner, together with two other persons, not including the defendant, were the individuals who had committed the crimes to which the defendant pleaded "guilty." Also accompanying such application, and urged as a part of and as grounds for granting the same, were affidavits by certain people which purported to set forth facts constituting "newly discovered evidence" which petitioner claims would have resulted in his acquittal had it been presented to and believed by a jury. This petition was denied by the superior court, and from the order denying the same defendant appealed to this court, where the order denying the writ was affirmed. People v. Vernon, 9 Cal.App.2d 138, 49 P.2d 326.

Following this, on September 11, 1936, nearly a year after the rendition of this court's decision, petitioner herein again presented to the superior court a petition for a writ of error coram nobis, praying therein that the said judgments rendered against him on his plea of guilty be vacated and set aside; that he be allowed to withdraw said plea of guilty and enter a plea of not guilty; and that he be given a trial on the merits of his case. When this petition came on for hearing in the superior court, the same was denied, whereupon the defendant gave oral notice of appeal from the order denying the petition and on September 23 filed written notice of appeal from said order. An application was made to the superior court for an order directing the official reporter to prepare a transcript on appeal. This application was denied on September 25, 1936, at which time the superior court made the following order: "The court refuses to order a transcript on appeal from the order denying petition for writ of coram nobis because the same points raised in this petition have been raised in previous petitions and litigated in the appellate court."

After permitting more than a year to elapse from the date on which the last-mentioned order was made by the superior court refusing to direct the respondent official reporter to transcribe his notes on the aforesaid petition for a writ of error coram nobis, petitioner herein presented to this court his petition for a writ of mandate, and an alternative writ was ordered to issue.

[1] Respondent urges and petitioner concedes that a motion to set aside and vacate a judgment, and an application for a writ of error coram nobis for the same purpose, are legal equivalents. This being so, respondent contends that only one motion to set aside and vacate a judgment on the grounds stated in the first motion, or which could have been stated therein, will lie; and the petitioner having moved to set aside the judgment, the first application for a writ of error coram nobis was properly denied. The law provides for and recognizes various motions after verdict, but each of such remedies may be availed of but once; and when the court has denied such motion, the right to make it and the right of the same court to rule upon such motion has been "exercised and exhausted"; and this is true even where no appeal is taken from the ruling on the motion. In fact, it was said in People v. Howard, 7 Cal. App.2d 283, 46 P.2d 268, 269: "And the fact that the second motion for the same relief is based upon other or additional grounds does not alter the rule." See, also, People v. Paysen, 123 Cal.App. 396, 399, 11 P.2d 431, and cases cited.

[2] It seems to us that when petitioner made his motion to set aside the judgment on September 8, 1933, some four years after the date of said judgment, all of the grounds upon which he based his petition for a writ of error coram nobis, if in fact they were true, were known to petitioner, and should have been urged in the motion to set aside the judgment. Notwithstanding the fact that petitioner had his day in court on his original motion to set aside the judgment, he was again permitted to present the same questions in his application for a writ of error coram nobis which came before this

court on appeal. Examination indicates that the petition for a writ of error coram nobis filed by petitioner on August 11, 1936, is in substance and effect identical with the petition filed by him on June 20, 1934; and therefore to permit an appeal to be taken from the order denying the later petition would be virtually allowing two appeals from the same ruling; and to permit this would in some cases have the effect of extending the time for appeal contrary to the intent of the statute. Possible consequences of such a situation were aptly described by this court, speaking through Mr. Justice Houser, in People v. Vernon, supra, 9 Cal.App.2d 138, at page 145, 49 P.2d 326, 329, as follows: "Assuming the correctness of such decisions as far as they announce the applicability of the writ to a given state of facts, and herein, for the sake of illustrating the point, making some of them possibly applicable to the position occupied by the applicant herein, it becomes apparent that if no legal limitation be placed upon his asserted right, at his pleasure, to renew his motion to vacate the judgment, or to apply for a writ of error, coram nobis, based upon either facts theretofore stated in a former application, or to a motion theretofore presented by him for the ultimate purpose of vacating the judgment, or upon facts then known to him, the final and really conclusive adjudication of the question of whether the judgment rendered against him should be vacated may never be determined. For example, failing in his present attempt to vacate the judgment after the lapse of an additional four and one-half years (as exists in the facts of the instant application), the defendant might make his third application on the ground that he was insane at the time he pleaded 'guilty,' which fact was unknown to both the court and the defendant's counsel [citing authorities]; and assumedly being unsuccessful in that particular effort, and following the result of a possibly unsuccessful appeal from the order denying such application, again and again, four and one-half additional years thence ensuing between each of such successive motions, he might present to the court a fourth, a fifth, a sixth (and ad infinitum) motions, each based on the ground that his plea of 'guilty' was procured by 'extrinsic fraud' [citing authorities], which in its respective inducing facts might materially differ from any such facts theretofore set up in either or any of the preceding motions of the kind that had been made by the defendant, and of which facts at all times, presumptively or actually, he had full and complete knowledge."

[3, 4] If petitioner may assign as grounds for separate appeals specific questions which he may have, or as in the instant case has, presented upon a former appeal, and which he raised on three separate occasions in the superior court, under the guise that each denial of such motions constitutes an order made after judgment affecting the substantial rights of the party (section 1237, subd. 3, Pen. Code), there would be scarcely any procedural finality to criminal cases. In fact, execution of judgments could practically be blocked by the employment of dilatory tactics. Naturally section 1237 of the Penal Code was not intended to be turned into any such thing. Substantial rights are not denied where the person charged had a full and fair opportunity to invoke every privilege or right which the law accords to an accused, and certainly this petitioner has had more than such a full and fair opportunity.

In addition to the foregoing, this court, in affirming the order denying defendant's previous petition for a writ of error coram nobis (People v. Vernon, supra), referring to the wisdom of the legal limitation upon the time within which such application should be made, said: "From the foregoing it follows that in the instant matter, in consideration of the facts, the pronouncement of a rule by which the asserted right of the applicant herein to a writ of error, coram nobis, would be recognized and validated, would be most disastrous in its results as far as order and system in the administration of justice are concerned."

For the foregoing reasons, the alternative writ of mandate heretofore issued is discharged, and a peremptory writ is denied.

We concur: YORK, P. J.; DORAN, J.

25 Cal.App.2d 303

SCHWARTZ v. SCHWARTZ et al.

Civ. 10366.

District Court of Appeal, First District, Division 1, California.

March 11, 1938.

1. Malicious prosecution ⚿51

An action for malicious prosecution would not lie at the instance of a plaintiff who alleged that the defendant maliciously conspired to cause plaintiff to be adjudged insane and committed to a state hospital, notwithstanding that inferentially at least plaintiff had been restored to competency.

2. Pleading ⚿236(1)

The granting of permission to file further amended pleadings was within the trial court's sound discretion.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin and I. L. Harris, Judges.

Actions by Max J. Schwartz against Mollie Schwartz and others to recover damages for malicious prosecution. Judgments of dismissal, and plaintiff appeals.

Affirmed.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellant.

Dinkelspiel & Dinkelspiel, of San Francisco, for respondents Mollie Schwartz and Philip Levin.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondent Merwyn H. Hirschfeld.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent Park Sanitarium.

PER CURIAM.

An appeal by the plaintiff on the judgment roll from three separate judgments entered in favor of defendants Mollie Schwartz, Philip Levin, Merwyn L. Hirschfeld, and the Park Sanitarium, a corporation.

Plaintiff's amended complaint alleged in substance that the three defendants first named maliciously entered into a conspiracy to cause the plaintiff to be adjudged insane and, by means of false swearing, caused him to be so adjudged and committed as an insane person to the state hospital at Agnew, Cal., where he remained for several months during the year 1932; further, that the defendant Mollie Schwartz, knowing the evidence upon which plaintiff was committed to be false, caused herself to be appointed guardian of his person and estate and thereby deprived him of the possession of his property, all to his damage, and that he was unable to procure her discharge as such guardian until the year 1934. Demurrers to the amended complaint were sustained, and plaintiff's motion for leave to file a second amended complaint was denied and judgments of dismissal were entered.

None of the complaints filed nor the proposed second amended complaint alleged that any of the proceedings terminated in plaintiff's favor except in so far as appears inferentially from the allegation that he has since been restored to competency.

[1] The present action is essentially one to recover for malicious prosecution; and the assault which plaintiff makes upon the judgments is predicated upon averments of intrinsic fraud in their procurement. The rule is well settled that the institution of a proceeding to declare a person insane cannot give rise to a cause of action in his favor for malicious prosecution where the proceeding terminated adversely to him and he was judicially declared to be of unsound mind, even though he be later restored to competency. Fetterley v. Gibson, 210 Cal. 282, 291 P. 411. In such cases the gist of the action is the alleged wrongful prosecution, not the alleged conspiracy. Revert v. Hesse, 184 Cal. 295, 193 P. 943; Andrews v. Young, Cal.App., 69 P.2d 891. While it is claimed that the opinion in Kellogg v. Cochran, 87 Cal. 192, 200, 25 P. 677, 12 L.R.A. 104, sustains the view that such an action might be otherwise sustained, an examination of the case shows that the only question there decided was that under the allegation of the complaint the plaintiff had legal capacity to sue. The facts alleged bring the present case within the rule stated and the orders sustaining the demurrers were proper.

[2] It is also urged that the trial court erroneously refused to permit further amended pleadings. This was a matter within the sound discretion of the court, which in the present case was not abused. Fetterley v. Gibson, supra.

No ground for the reversal of the judgments has been shown, and the same are accordingly affirmed.

25 Cal.App.2d 202

ALLEN v. CORBETT et al.

Civ. 11631.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1938.

Hearing Denied by Supreme Court
April 28, 1938.

1. Taxation ⚷546

The State Board of Equalization had right to order dismissal of tax collector for unsatisfactory services at any time within six months' probationary period following his appointment under certification by state personnel board. St.1913, p. 1035, as amended; Const. art. 24.

2. Taxation ⚷546

The action of State Board of Equalization in dismissing tax collector for unsatisfactory service by resolution, adopted within six months after his certification by state personnel board and appointment to permanent position pursuant thereto, was taken during his probationary period, as required to be effective, though period of his service, including time served as temporary appointee before such certification, exceeded six months. St.1913, p. 1035, as amended; Const. art. 24, § 4(c), adopted Nov. 6, 1934.

3. Taxation ⚷546

A tax collector, dismissed by State Board of Equalization for unsatisfactory service during his probationary period, is not entitled to reinstatement on ground that he was appointed by board's secretary only, without resolution by board. St.1913, p. 1035, as amended.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding by Mearl Allen against John C. Corbett and others, members of and constituting the State Board of Equalization, and others for a writ of mandate compelling such board to reinstate petitioner as collector and pay him his accrued salary. Judgment for petitioner, and defendants appeal.

Reversed.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellants.

Frank L. Stearns, of Los Angeles, for respondent.

WOOD, Justice.

Petitioner commenced this proceeding in the superior court to obtain a writ of mandate compelling the Board of Equalization to reinstate him in the position of collector and to pay to him his accrued salary. Other officers and boards are joined for the purpose of enforcing the judgment. From a judgment in favor of petitioner, the defendants have appealed.

The position to which petitioner seeks reinstatement comes within the provisions of the state Civil Service Act, St.1913, p. 1035, as amended, and the constitutional amendment added in December, 1934. Petitioner was given a temporary appointment to the position on May 11, 1935, at which date no examination had been held, and consequently there was no eligible list from which an appointment could be made. On June 20, 1935, the Personnel Board, successor to the Civil Service Commission, having conducted an examination for the position of collector, certified to the Board of Equalization a list of twenty-five eligibles to fill twenty-three positions. The petitioner was not certified at this time, since he had been given a rating as number thirty on the list made up following the examination. Seven persons who had been certified on June 20 waived appointment and on August 1, 1935, a supplemental certification of eligibles was made; the name of petitioner appearing therein. Following the supplemental certification petitioner was appointed to the position of collector on September 1, 1935. Petitioner had been actually employed continuously from May 13, 1935. The Board of Equalization at its meeting on January 6, 1936, adopted a resolution dismissing petitioner from his position on account of unsatisfactory service during his probationary period.

[1] It is conceded that if petitioner had served as a probationary employee for six months prior to January 6, 1936, the dismissal by the board at that time would not be effective to sever his connection with the state service. On the other hand, the board doubtless had the right to order the dismissal of petitioner, if it found his services to be unsatisfactory, at any time within the period of six months following his appointment under certification. To determine petitioner's rights, therefore, we must

determine the date of the commencement of his probationary period.

[2] At the election held November 6, 1934, article 24 was added to the Constitution of California, relating to civil service employees. By this amendment the Personnel Board was created and was given the jurisdiction theretofore exercised by the Civil Service Commission. In section 4(c) of article 24 it is provided: "The rules, regulations, classes and grades of positions heretofore lawfully adopted by the State officer or agency heretofore administering said laws are continued in force and upon the effective date hereof the same shall become the rules, regulations, classes and grades of positions of the board herein created subject to change by said board in the exercise of its powers herein conferred or as may be hereafter provided by law." The rules of the Civil Service Commission in effect at the time of the adoption of the constitutional amendment provided: "All appointments from eligible lists for original entrance or promotion shall be for a probationary period of six months, which probationary period shall not include the time served as a temporary or emergency appointee, but shall date from the time of appointment to a permanent position after certification." It is manifest from the rule just quoted that petitioner cannot count as part of his probationary period the time served by him as a temporary appointee. His probationary period must necessarily begin to run "from the time of appointment to a permanent position after certification." Petitioner was not certified until August 1, 1935, and his appointment was made on September 1, 1935. It follows that the action of the board on January 6, 1936, was taken during the probationary period of six months.

[3] Petitioner claims that no resolution was passed by the board in August or September concerning his appointment, and that the appointment of September 1, 1935, was by the board's secretary only. No benefit can accrue to him from this contention, since if the action of the secretary was ineffectual he could not show that any appointment whatever was made after certification.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

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25 Cal.App.2d 751

Ex parte HERRICK.

Cr. 357.

District Court of Appeal, Fourth District, California.

Feb. 23, 1938.

Hearing Dismissed by Supreme Court March 25, 1938.

Municipal corporations 🔑619

An ordinance purportedly enacted to increase employment and to eliminate unfair trade practices and ruinous price-cutting evils in the cleaning and dyeing industry in city, which fixed a minimum price for cleaning and pressing a man's suit and made violation of ordinance a misdemeanor, was invalid. St.1937, p. 1215.

Proceeding in the matter of the application of Harry Herrick for a writ of habeas corpus to procure the petitioner's release from confinement under a charge of violation of an ordinance of the City of San Bernardino.

Petitioner discharged and his bail exonerated.

Martin J. Coughlin, of San Bernardino, for petitioner.

H. R. Griffin and Stanley Mussell, both of San Bernardino, for respondent.

PER CURIAM.

The petitioner seeks his release from confinement under the charge of violating the provisions of ordinance No. 1597 of the city of San Bernardino. That ordinance purports to adopt a code of fair competition for the cleaning and dyeing industry in that city, and was passed pursuant to an act of the state Legislature relating to the adoption of such codes. Chapter 396, Stats.1937, p. 1215. The ordinance recites that such code is thereby set up for the purpose of "increasing employment, establishing fair and adequate wages, effecting necessary reduction of hours, improving the standards of labor, and to eliminate unfair trade practices and ruinous price cutting evils to the end of rehabilitating the Cleaning and Dyeing Industry in the City of San Bernardino, and enable it to do its part toward establishing that balance of industries which is necessary to the restoration and maintenance of the highest practical degree of public welfare." The ordinance fixes a minimum price for various services to be performed by persons engaged in that industry, including a minmum price for cleaning and pressing a man's suit. It makes a violation thereof a misdemeanor punishable by fine not exceeding $500, or by imprisonment in the city jail for a period not exceeding six months, or by both such fine and imprisonment.

The petitioner was arrested and taken into custody on a charge of violating this ordinance by cleaning and pressing a man's suit of clothes for a sum of money less than that fixed as the minimum price by the code thus established. This proceeding followed.

In Re Kazas, 70 P.2d 962, this court considered a similar ordinance establishing a minimum price for various forms of barber services, although the ordinance there in question had been passed pursuant to a different act of the Legislature. In so far as principles are concerned, we are unable to distinguish that case from the one now before us. The material facts in both cases are essentially similar and the questions of law involved are, in substantial effect, identical. Those questions were fully considered in the case referred to, most of the reasoning there used is applicable here and it would serve no useful purpose to repeat the same. The decision in that case was followed by In re Landowitz, Cal.App., 71 P.2d 334. Upon the authority of those cases, and for the reasons set forth in the first of them, the petitioner is discharged and his bail exonerated.

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25 Cal.App.2d 225

ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO v. STAFFORD et al. (ZELLERBACH et al., Interveners).

Civ. 10734.

District Court of Appeal, First District, Division 2, California.

March 3, 1938.

1. Trusts 🔑195

Where trust which was created pursuant to agreement among several parties including certain creditors of settlor contained provision permitting trustee to sell part of corpus to pay such creditors, at their option, after lapse of two years, if such creditors were not paid from income of trust within the two-year period, trustee had no power to sell part of corpus to pay the creditors prior to the termination of the two-year period and against the wishes of the creditors.

2. Trusts 🔑273½

A court of equity will not under any circumstances increase the size of the cestui's interest, as where it is asked to order a sale of capital in order to pay part of the proceeds to a life tenant who was given income only.

3. Trusts 🔑273½

Where trust which was created pursuant to agreement among several parties, including certain creditors of settlor, provided for payment of the debts to the creditors as remaindermen after certain other payments were made from the income of the trust, the trustee had duty to hold the corpus intact as to the creditors, in absence of evidence that corporate stocks constituting the corpus were to be lost to the trust estate, or that corporate entity which issued the stocks was insolvent or threatened with insolvency, even though needs of the immediate beneficiaries might authorize sale of corpus.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Anglo-California National Bank of San Francisco, as successor-trustee, against Arthur Zellerbach and others for declaratory relief in the nature of the construction of a trust created by Arthur Zellerbach, wherein Harold L. Zellerbach and another intervened. From an adverse judgment, the interveners appeal. After the trial and before briefs were filed on appeal, Arthur Zellerbach died, and Harry I. Stafford, as executor of the last will and testament of Arthur Zellerbach, was substituted as a party.

Reversed.

Pillsbury, Madison & Sutro, of San Francisco (Eugene D. Bennett and Fredrick H. Hawkins, both of San Francisco, of counsel), for appellants.

Orrick, Palmer & Dahlquist, of San Francisco, for respondent Anglo California Nat. Bank of San Francisco.

Daniel R. Shoemaker and Dean Cunha, both of San Francisco, for respondent Harry I. Stafford, as executor, etc.

Young, Hudson & Rabinowitz, of San Francisco, for respondent Dorothy Johnson Zellerbach.

STURTEVANT, Justice.

From a judgment modifying certain trust agreements the remaindermen have appealed.

Arthur and Isadore Zellerbach were brothers. Harold L. and J. D. Zellerbach are the sons of Isadore, and were nephews of Arthur. Dorothy Johnson Zellerbach is the first divorced wife of Arthur. Dorothy Ryan Zellerbach is the second divorced wife of Arthur. Philip S. Ehrlich is an attorney at law, and was the trustee named in all of the trusts excepting the last one that will be mentioned. The Anglo California National Bank of San Francisco was substituted as trustee in the place of Philip S. Ehrlich. On January 20, 1923, Arthur, as trustor, entered into a trust with Harold L. and J. D. as the beneficiaries, which provided for the transfer of shares of stock of the Zellerbach Paper Company which Arthur was shortly to receive from his mother's estate. On July 28, 1923, Arthur, as trustor, and Harold L. entered into a similar agreement regarding certain additional shares of stock of the Zellerbach Paper Company. On June 21, 1927, a further agreement was entered into by Arthur, Isadore, Harold L., and J. D. Zellerbach, and Philip S. Ehrlich, under the terms of which Philip S. Ehrlich was substituted as trustee in the first two agreements. The agreement last mentioned also provided for the payment of $300 per month to Dorothy Johnson Zellerbach during the life of Arthur. Isadore, who held assignments from Arthur for all of the income of the trust to secure advancements, theretofore made to Arthur, and other indebtedness, subordinated his rights to the monthly payments to be made to Dorothy Johnson Zellerbach. Arthur expressly acknowledged the financial aid theretofore rendered to him by his brother, and he expressly ratified and confirmed the trust agreements made in 1923. Except as modified, such agreements were to remain in full force and effect. The shares of stock comprising the corpus of said trust were by the corporate action and reorganization of the corporations converted into voting trust certificates representing 11,655 shares of common stock of Crown Zellerbach Corporation and 2,331 shares of preferred stock of such corporation. On July 22, 1930, a further written agreement was entered into by Arthur, as trustor, Dorothy Ryan Zellerbach, as beneficiary, and Philip S. Ehrlich, as trustee. By its terms $200 per month was made payable to the beneficiary. That agreement by its terms subordinated the claim of Isadore to the assignments theretofore made by Arthur. On October 5, 1935, a six party agreement was entered into by all of the parties above mentioned excepting this plaintiff and Dorothy Ryan Zellerbach. It provided for the resignation of Mr. Ehrlich and shortly after its execution he resigned as trustee and this plaintiff was substituted. Said document provided (1) for the sale of a portion of the corpus of the trust to pay certain creditors of Arthur and his two divorced wives in the total amount of $49,521.70; (2) for the release of all claims by Dorothy Ryan Zellerbach; (3) for the reduction of the monthly payments to Dorothy Johnson Zellerbach out of the income from the trust from $300 to $250 per month; (4) for the resignation of Philip S. Ehrlich as trustee and the substitution of a corporate trustee in his place and stead; (5) the income of the remainder of the trust property was to be disbursed by the trustee in priority as follows: (a) The payment of the annual premiums on a policy of life insurance on the life of Arthur Zellerbach. The beneficiary of this policy was respondent Dorothy Johnson Zellerbach. (b) The sum of $250 per month to Dorothy Johnson Zellerbach during her life. Such payments to terminate on the death of Arthur Zellerbach. (c) The sum of $250 per month to Arthur Zellerbach during his life. (d) Any excess over and above the amount required for the abovementioned payments to be paid to appellants and to I. Zellerbach in equal amounts and to such extent as necessary to discharge certain personal debts then due and owing to the three last-named persons by Arthur Zellerbach.

Upon the discharge of the aforementioned debts out of the income, as above mentioned, then all of the income after the payment of the premiums on the aforementioned insurance policy and the monthly payment of $250 to Dorothy Johnson Zellerbach, was to go to Arthur Zellerbach during his life. Then followed a paragraph, the construction of which is the crux of this litigation. Bearing in mind that Harold L. Zellerbach was the third party, J. D. Zellerbach the fourth party, and I. Zellerbach was the fifth party, said paragraph is as follows: "6. *In the event* *that the aforementioned indebtedness due and owing said third, fourth and fifth parties as hereinabove mentioned in paragraph 5 hereof is not fully paid and discharged within the period of two (2) years following the date hereof, then at the option of the third, fourth, and fifth parties* the trustee shall sell so much of any of the common stock or voting certificates representing the same which said trustee shall hold, and if that is not sufficient, then as many shares of preferred stock as may be necessary to pay off and discharge in full the balance of each said indebtedness. Said preferred stock, however, shall not be sold for such purpose for less than the sum of fifty dollars ($50) per share." (Italics ours.)

After the trial, but before briefs were filed on appeal, Arthur Zellerbach died. Thereafter, such proceedings were had that Harry I. Stafford, as executor of decedent's last will and testament, was substituted and he appeared as respondent in the place of the decedent.

Conflicting claims having been made on the trustee the latter commenced an action asking for declaratory relief. That complaint was answered and a complaint in intervention was filed by Harold L. and J. D. Zellerbach. That complaint was also answered and a trial was had on the issues presented by said pleadings. The trial court made findings of fact in favor of Arthur Zellerbach and later caused a judgment to be entered which in part is as follows: "Now, therefore, it is hereby ordered, adjudged, and decreed that the Anglo California National Bank of San Francisco, as successor trustee, sell a sufficient number of the voting trust certificates representing shares of the common stock of the Crown Zellerbach Corporation to fully pay and discharge the obligations owed by the defendant, Arthur Zellerbach to J. D. Zellerbach, Isadore Zellerbach, and Harold L. Zellerbach, and that said sale be made upon the San Francisco Stock Exchange, or the New York Stock Exchange at the present available market price as soon as possible." The interveners have appealed.

They contend that none of the findings support or justify the judgment below and that the findings upon which the judgment was predicated are not supported by the evidence. These attacks involve the proper construction of the provisions of the declarations of trust or, to be more specific, the construction of the agreement dated October 5, 1935. Arthur Zellerbach was called as a witness. He identified certain documents and gave some evidence as to his needs. Otherwise there was no evidence aliunde the written instruments as to the meaning of any portions thereof.

The first point presented by the interveners is that the death of Arthur Zellerbach ended the controversy and the action below became moot. In view of the conclusions we have reached on the other points made by the interveners it will not be necessary to discuss the first point.

[1] The interveners contend the express provisions of the agreements between the parties show that the trustee, under the facts existing at the time of the trial, had no power to sell a part of the corpus to pay the debts in question. They quote in full paragraph 6 of the agreement dated October 5, 1935, and call particular attention to the language which we have set forth in italics. They then call to our attention that they never exercised the option mentioned in said paragraph and furthermore that the period of two years specified in said paragraph had not expired when this action was commenced March 11, 1936. They further call attention to the fact that they never applied to the trustee to make the sale but at all times have opposed the sale. Thereupon they contend there was no express power authorizing the trustee to make the sale. In that connection they assert the general rule is that a trustee "has no authority beyond that expressly conferred." 65 C.J. 645. They further contend that the written instruments reveal the only implication possible is that the power for which Arthur Zellerbach and his representative contend is prohibited to the trustee. In that regard they call particular attention to the fact that under paragraph 1 the trustee was authorized to make sales to the extent of $49,521.70 to pay certain obligations of Arthur Zellerbach, including one in the sum of $30, but that authorization did not include power to sell for the purpose of paying the obligations owing to the third, fourth and fifth parties to the agreement. On the other hand, that under paragraph 5 specific provisions were inserted providing for payments of the income, specified sums to specified persons, and then in the event an excess was on hand payments could be made to the third, fourth and fifth parties. Thereupon the defendants argue that such provisions were plainly an implication that the sale which was ex-

pressly authorized was not to cover obligations to the third, fourth, and fifth parties but was an implication that no sale should be made to cover their obligations except as set forth in said paragraph 6. These respective contentions are clearly supported by the record. The trustor replies the passages just enumerated may "negative a duty to sell before two years, but they certainly cannot negative a power to sell before that time." That reply is not supported by the language used by the parties. No authority is cited which requires this court to place the strained construction on the language of the parties for which the trustor contends. He cites Guaranty Trust Co. v. U. S. Steel Corp., 107 Misc. 720, 176 N.Y.S. 402. It is not at all in point. The facts of that case were as follows: A decedent left a will in which he created a trust which covered, among other things, certain securities. Under the statutes of the state of New York some of those securities could not legally be purchased with trust funds, however, the decedent inserted in his will "power to retain all of the property invested as it is now." Without applying to the court for permission the trustee was about to sell the securities for the purpose of complying with the law of the state of New York. There is nothing in the decision showing that the trustee was doing or attempting to do anything excepting to make a conversion of an illegal investment into a legal investment. On page 403 of 176 N.Y.S., the court said: "it is contended by the plaintiff that it is the duty of the trustee to sell nonlegalized securities unless prohibited by the trust instrument, and that mere authority to hold such securities is not a prohibition of the power of sale. I hold the latter rule to be the correct one."

[2, 3] The interveners in the next place show that under the terms of the written instruments above mentioned they became remaindermen. As to them they contend it was necessary that the trustee hold the corpus intact and that under the facts contained in the record a court of equity had no power to require that the corpus or a part thereof be sold and the proceeds applied as if they were entirely free of the trust. In 4 Bogert in his work entitled "Trusts and Trustees," at page 2367, the author states: "It (a court of equity) will not under any circumstances increase the size of the cestui's interest, as where it is asked to order a sale of capital in order to pay part of the proceeds to a life tenant who was given income only." The author cites Mills v. Michigan Trust Co., 124 Mich. 244, 82 N.W. 1046, and Petition of Fero, 9 How.Prac., N.Y., 85. The decisions cited support the text. Other authorities to the same effect are Thurston v. Thurston et al., 6 R.I. 296; Troy v. Troy, 45 N.C. 85, 87; Standard Oil Co. v. Mehrtens, 96 Fla. 455, 118 So. 216; In re Mills, 28 App.Div. 258, 50 N.Y.S. 995; In re Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316. To that contention the trustor makes no direct reply. He is contented to state the rule that where the trustee fails to take steps to protect a trust then a court of equity has power to compel the trustee to take such steps as may be necessary to do so. The trustor cites Stephens v. Howard's Executor, 32 N.J.Eq. 244. In that case the court held that where a legacy is given *to an infant unconditionally*, so that it vests at once, but is payable when it attains twenty-one, and its father is unable to support it, and the interest arising from the legacy is not sufficient for that purpose, a court of equity may, in advance of the time fixed for payment by the will, order the principal of the legacy applied to the support of the legatee. On facts quite similar the Supreme Court of Tennessee made the same ruling in Bennett v. Trust Co., 127 Tenn. 126, 153 S.W. 840, 46 L.R.A.,N.S., 43, Ann.Cas.1914A, 1045. The trustor also cites and quotes from Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497, L.R.A.1916B, 1073, Ann.Cas. 1916A, 996. That case involved a trust deed executed by William Martin in 1860. The deed conveyed lands immediately adjacent to what was then the village of Decatur in the state of Illinois. Its construction was involved in two different actions. The first one was Johns v. Johns, 172 Ill. 472, 50 N.E. 337, 340. This trustor does not cite that case. A complete understanding of the second decision, the case cited by this trustor, involves a short statement of the facts chronologically. In 1860 William Martin executed the trust deed in favor of Harvey C. Johns, his son-in-law, as trustee. The corpus of the trust was an improved farm adjacent to the village of Decatur. The beneficiaries named were Jane M. Johns, the daughter of the trustor, and the heirs of the body of Harvey C. and Jane M. Johns. The deed contained no prohibition regarding sales, neither did it contain any authority to sell. It authorized the trustee to enter, farm, manage, and control the farm; to collect the rents, issues, and profits, to pay all taxes and assessments, to pay himself a reasonable compensation for his performance of his duties under the trust and then to appropriate the balance as follows: (1) To the support and maintenance of Jane M. during her lifetime; and (2) to the support, maintenance, and education of the children of Harvey C. and Jane M. Johns; (3) residue for improvement of trust estate; but no debt shall be incurred for improving the real estate. The trust was to continue during the life of Jane M. Johns and until her youngest child should attain the age of twenty-one. After the death of Jane M. and after the youngest child attained twenty-one, the estate was to be divided among the children. In 1895 Jane M. filed a bill in chancery in which she set forth, among other things, that the real estate was then of a value of $200,000; that the net income during the preceding year was $640; that neither Harvey C. nor any of the other members of the family had any other source of income; that some were in feeble health and were specially in need; and that the home was in need of major repairs which would cost about $3,000. She asked that a part of the land be sold; that the proceeds be invested, and that $3,000 be set aside for repairs, certain sums be awarded to herself and to certain of the children for maintenance, support, education, etc. The trial court granted the relief prayed for. On appeal the Supreme Court of Illinois was at pains to point out that the record did not present facts showing that the trust was "created for the purpose of devoting the subject-matter of the trust to the benefit of *infants or lunatics, or persons under other disabilities, during the continuance of such disability, and only because of the existence of the disability.*" The court quoted from decisions that if such facts had been shown it could have sustained the decree. But on page 342 of 50 N.E., the court said: "But those cases are not to be understood as authority for the proposition that the court, in the case of a trust such as appears at bar, is justified in breaking in upon the trust, and disposing of the subject-matter, against the will of the donor, on the ground that the immediate beneficiaries will receive greater benefit by reason of the proposed change in the trust than would accrue to them if the trust is administered according to the will of the donor. * * * The mere fact that a sale of the land might benefit the beneficiaries more than the compliance with the terms of the trust does not furnish a reason for a decree ordering the title of the land to be disposed of in opposition to the manifest wish of the donor. The duty of the court in dealing with such a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject-matter of the trust, or some other like necessity, demands interference with his will and intention. The evidence does not disclose a condition of such urgency or necessity. The decree is grounded solely upon the interest and convenience of the immediate beneficiaries. This is not enough to justify a decree nullifying the expressed wish and purpose of the creator of such a trust as the one under consideration. The decree is reversed, and the cause remanded." That decision is a clear statement to the effect that the mere needs of Arthur Zellerbach and Dorothy Johnson Zellerbach did not authorize the trial court, in the instant case, to break in upon the trust as it was written.

At a date somewhat prior to 1914 there had been important changes in the facts involving the above-mentioned Martin trust. Harvey C. Johns, as trustee, had been replaced by Robert R. Montgomery. The village of Decatur had grown into a large city. Many houses had been constructed near the land included in the trust. Another bill was filed based on new facts. Another decree was entered against the trustee. It was reviewed in the case entitled Johns v. Montgomery, supra. In 106 N.E. 498 the Supreme Court of Illinois states the facts as follows: "The tract of land involved in this trust at the time the deed was made was in the suburbs of the city of Decatur. At that time the best use to which it could be put was for agricultural purposes. It appears from the bill, the evidence, and findings of the court that the city of Decatur has extended its boundaries and increased in population so that at present the land in question is almost, if not totally, surrounded by the inhabited portion of the city of Decatur and is now within the city limits. It is shown that there are 637 houses and 2,498 inhabitants living within two blocks of said premises, and that as a result its usefulness as a farm has decreased, while its general value has materially advanced. It also appears that in its present situation the only use to which the premises can be put is for pasturage, and that the income therefrom for such purpose is wholly insufficient to defray the taxes and other necessary expenses of maintaining the premises. It also appears that the city authorities are contemplating proceedings for special street and sidewalk improvements, and for a large sewer which will pass entirely through the tract, and other local improvements are under contemplation which will have to be paid for by special assessment or special taxation, and from the evidence it is shown that the special taxes levied upon the trust property for these various local improvements will be from $100,000 to $140,000, and that there is no source of income from which these burdens can be paid under the existing terms of the trust, and that if the trust deed is not modified the result will be the complete destruction of the trust estate and its total loss to the beneficiaries." As to the law applicable, the court says: "In regard to the jurisdiction of courts of chancery to direct the conversion of real estate into personal property, and vice versa, and to decree other modifications of trust agreements when it becomes necessary to preserve the trust estate, it may be stated as a general proposition that, while the power is exercised with great caution, it has become a well-established rule that, when the courts can see that unforeseen conditions have arisen which make it necessary to preserve the rights of beneficiaries under trust instruments, to change the terms of the trust, courts of equity have not hesitated to direct such necessary modifications as will preserve the trust estate for the use of the beneficiaries. * * * The facts here present the alternative of modifying the trust agreement or else losing the entire trust estate. Had the donor of this trust foreseen the exigencies that have arisen since the trust deed was made, a due regard for the interest of his beneficiaries would have compelled him to make a provision for the sale of a portion of this estate in order to preserve the whole. Apparently the only means left open to the beneficiaries under this trust is to appeal to a court of equity to preserve their estate by permitting a subdivision and sale of the premises, or, in other words, to authorize a conversion of real estate into personal property. In our opinion the facts present a case calling for the interposition of a court of equity in order to preserve a trust estate which would otherwise ultimately be lost to its owners." But in the case at bar there was not a particle of evidence to the effect that the corporate stocks were to be lost to the trust estate, nor was there any showing to the effect that the corporate entity which issued the securities was insolvent or threatened with insolvency.

It follows that the judgment appealed from should be reversed, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

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25 Cal.App.2d 142

LAMBERT, County Auditor, v. FENELON, County Purchasing Agent.

Civ. 2107.

District Court of Appeal, Fourth District, California.

Feb. 23, 1938.

Hearing Denied by Supreme Court April 21, 1938.

1. Counties 🔑113(1), 114

Though board of supervisors or purchasing agent has discretion in purchasing county supplies, such discretion must be reasonably exercised for the public good, in view of legislative purpose of economy and efficiency. Pol.Code, § 4041.13.

2. Counties 🔑113(1), 114

The statutory powers of boards of supervisors and purchasing agents in purchasing county supplies are intended for benefit of the public, not for benefit of dealers in supplies. Pol.Code, § 4041.13.

3. Counties 🔑113(1), 114

Where a county officer's work can be more efficiently done with one article than with another of similar value, and no issue of economy is involved, failure to purchase article which would best contribute to public good is abuse of discretion of board of supervisors and purchasing agents, irrespective of policy of equitable distribution of county purchases among various sellers. Pol.Code, § 4041.13.

4. Mandamus 🔑73(1)

Where county purchasing agent refused to honor county auditor's requisition for a particular make of typewriter, on sole ground that firms handling other standard makes were "in line for their share of patronage," though use of specified make would conduce to greater efficiency, auditor was entitled to writ of mandate to compel honoring of requisition, since purchasing agent's refusal was not exercise of lawful discretion. Pol.Code, § 4041.13.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding for writ of mandate by W. T. Lambert, as Auditor of the County of Orange, against Eugene Fenelon, as Purchasing Agent of the County of Orange. From an order directing issuance of a peremptory writ, defendant appeals.

Affirmed.

B. Z. McKinney, of Santa Ana (George H. Tobias, of Santa Ana, of counsel), for appellant.

L. W. Blodget, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order directing the issuance of a peremptory writ of mandate.

The respondent filed a requisition in due form for an "18 inch carriage L. C. Smith Standard Typewriter" for use in the auditor's office. The appellant refused to comply with the requisition as made, but offered to purchase for the auditor a typewriter of that size and of any make other than the one named in the requisition. He wrote to the auditor as follows: "In the face of the resolution passed by the Board of Supervisors on March 30, 1937, ordering the Purchasing Agent to give an equitable distribution of supplies and equipment among the firms of Orange County when and where practical, I am compelled to disregard this requisition for an L. C. Smith Typewriter as any one of the other firms handling typewriters are in line for their share of patronage."

The auditor filed a petition for a writ of mandate commanding the purchasing agent to purchase for the use of the auditor's office a typewriter as described in the requisition alleging that he was unable to operate his office efficiently without the same, that the purchase thereof had been refused, and that such refusal was purely arbitrary, unreasonable, dictatorial, unlawful, and in disregard and violation of the duty of the purchasing agent. The purchasing agent answered alleging, among other things, that he had offered to furnish the auditor with a typewriter of that size and of any other make, that at the time this request was filed the firm handling L. C. Smith typewriters in Orange county had received more than its share of the business, and that at that time other firms in that county handling other standard makes of typewriters were in line for their share of the business pursuant to the above-mentioned resolution of the board of supervisors. A number of affirmative defenses were set up, consisting chiefly of the defense that under the state laws the purchase of such supplies was vested exclusively in the board of supervisors to be exercised through their agent and employee, the purchasing agent, that the matter was entirely within the discretion of the purchasing agent or of the board, and that mandamus would not lie to control their discretionary acts.

Evidence was introduced to the effect that a typewriter of this size was needed in the auditor's office; that about twelve typewriters were in use in that office, all of which were L. C. Smiths; that there were fifteen employees; that all of the typewriter operators in the office were L. C. Smith operators; that machines in the office were used by more than one operator; that it would slow down the work if it was necessary for operators to use different makes of machines; and that the office could be operated more efficiently if the equipment was standardized so that operators would not have to change from one make of machine to another. Among other things, the court found that a typewriter as described in the requisition is necessary for the proper maintenance and operation of the auditor's office, that the auditor is unable to efficiently operate and maintain his office without such a typewriter, that the purchasing agent had offered to purchase a typewriter of that size of any other make but had refused to purchase one of the kind named in the requisition, that the reason given for such refusal was that certain firms handling typewriters were entitled to the patronage and no other reason for the refusal was given, that such refusal is not based upon any ground of efficiency or economy in the operation of the office of the auditor or in the performance of the duties of the purchasing agent, but that said refusal was purely arbitrary, unreasonable, dictatorial, unlawful, and in disregard and violation of the duties of the purchasing agent. The issuance of a peremptory writ as prayed for was ordered and this appeal followed.

It is unnecessary to consider all of the points raised or suggested. The facts are undisputed and it has not been contended that the typewriter was not needed or that any issue of quality or economy was involved. The cause was tried solely with regard to appellant's theory that a discretion rests with the board of supervisors, or the appellant as its agent, that the policy of distributing patronage expressed in the resolution referred to was a rightful exercise of this discretion which could not be interfered with by the court, and that the fact that the purchasing agent was acting in accordance with this announced policy was a sufficient defense in this proceeding. The real question to be decided is whether, under the facts here appearing, the issuance of this writ interferes with the proper exercise of any discretion on the part of the board or of the purchasing agent.

[1] Without doubt the power and duty of purchasing supplies for county offices rests with the board of supervisors, and in some counties, in accordance with statutory provision, this duty is delegated to a purchasing agent. Pol.Code, § 4041.13. It is unnecessary to decide whether, strictly speaking, this agent is an officer or an employee, or whether any discretion which exists rests with the board or with such purchasing agent. A discretion in the purchase of county supplies necessarily exists, but is one which must be reasonably exercised for the public good, and we may assume for the purposes of this decision that such discretion rests with the purchasing agent. The purpose of the statutes which provide for the appointment of a purchasing agent and define his duties is not only to relieve the board of supervisors from the details involved in purchasing necessary supplies, but to concentrate these matters in one office to the end that supplies may be purchased in quantities, that the best prices may be obtained, that waste may be eliminated, and that this phase of the county business may be more economically and efficiently administered in the public interest. It is easy to see that this purpose would often be defeated if the announced policy of distributing patronage to various firms in accordance with their turn, as this policy was interpreted by this appellant, were to be sustained as lawful and as necessarily sufficient. In many cases it would be useless to seek competitive bids or prices if the firms in question knew in advance that the business would be ratably divided among them as their respective turns came.

[2, 3] The powers given to boards of supervisors and to purchasing agents by the statutes were intended to be and are for the benefit of the public and not for the benefit of certain dealers in supplies. The discretion given is likewise one to be exercised in the public interest and not as a means of distributing patronage. Doubtless a discretion may be exercised in determining whether or not an article is needed, but the need is here conceded and no discretion remained to be exercised in that respect. It may be assumed that a discretion also exists with respect to what quality of article is needed in respective cases, and as between a high-priced article and one of lower price. Where such a discretion exists a difference in price or quality may properly determine the exercise thereof. But where articles are standardized to the extent that quality and price are the same, that particular reason for the exercise of discretion no longer exists. We may further assume that in the absence of any other consideration a discretion exists with respect to which of two similar articles of equal value should be bought, or with respect to where one of them should be bought, since the matter must be decided and the power must rest somewhere. However, as between similar articles of equal value there may be other considerations which affect the matter, and which may be determinative. If the work of a county officer can more efficiently be done with one article than with a similar one of equal value, the public interest demands that such article be furnished where no good reason appears to affect that valid and important reason, and where no issue of economy is involved. In such a case it would be an abuse of discretion to do anything other than purchase the article which would best contribute to the public good. The equitable distribution of county purchases between various sellers may be all right in itself, and commendable up to a certain point, but must not be allowed to interfere with the best possible efficiency in handling the public business. The whole consideration is the public good and if a particular make or kind of article will enable the public business to be better carried on that fact may be controlling. In other words, we think there can be no discretion either in the board of supervisors or in the purchasing agent which can rightfully and properly be exercised when only two courses are open, one

of which is in the public interest and the other is not.

[4] While there are a number of typewriters on the market which sell at the same price and are presumably of equal value it is a well-known fact that individual operators have their preferences, that some can do better work on some machines than on others, and it is not unreasonable to believe that the efficiency of operators may be affected if they are required to constantly shift from one make of machine to another. Such a conclusion is supported by the evidence and the findings here.

Assuming that there was any room for discretion in this instance, it clearly appears and the court found that the appellant did not exercise or attempt to exercise any discretion with respect to the value of a typewriter or to its suitability for the work for which it was intended. The appellant argues: "A proper requisition in the case at bar would have been one which merely requested 'an eighteen inch carriage standard typewriter'—without the insertion of a particular make. Pursuant to such a request the agent could then be given the freedom to contact the open market and decide between the many various makes of machines—concluding which purchase would be most beneficial, in all of its features, for county use." It appears without question that the appellant did not desire, intend, or propose to exercise any freedom to contact the open market or to decide between the various makes of machines, as to which would be most suitable for this particular use. As presented in the trial court and here, the appellant's position is, not that he had a discretion which could otherwise be rightfully exercised in the public interest, but that he was bound, by the resolution passed by the board of supervisors, to distribute the patronage to dealers who were then in line for their share of the business, and that he intended so to do without regard to other considerations. The only reason given by the appellant for refusing to honor this requisition is one which has no basis in law, which cannot be sustained under these circumstances, and which furnishes no defense in this proceeding in the face of the showing made by the respondent and in the absence of any other showing on the part of the appellant.

We conclude that, under the facts here appearing, there was no discretion which could be lawfully exercised in another way, and it follows that the order for the issuance of the writ does not in any way interfere with the proper exercise of any discretion on the part of the appellant.

The order is affirmed.

I concur: JENNINGS, J.

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25 Cal.App.2d 148

PEOPLE v. YOUNG.

Cr. 3006.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1938.

Hearing Denied by Supreme Court March 25, 1938.

1. Criminal law 🔑738

The question of intent in committing an offense is for the jury.

2. Criminal law 🔑1159(5)

Where the evidence is such that the jury can reasonably infer guilty intent, its verdict cannot be disturbed by an appellate tribunal.

3. Criminal law 🔑554

A jury may reject a defendant's denial of any wrongdoing and accept the testimony of witnesses who contradict him.

4. Criminal law 🔑1158(1)

Under the Constitution, the appellate courts may not review evidence unless it is patently insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Const. art. 6, § 4½.

5. Larceny 🔑65

Evidence that dealer obtained money from finance company on a canceled contract and refrigerator for which dealer had been paid in full authorized conviction for grand theft, notwithstanding other evidence from which contradictory inferences might have been drawn. Code Civ.Proc. §§ 1847, 2061.

6. Forgery 🔑44

Evidence that dealer obtained money from finance company on the strength of conditional sales contracts purporting to show a sale to individuals who were nonexistent authorized conviction for forgery, notwithstanding other evidence from which contradictory inferences might have been drawn. Code Civ.Proc. §§ 1847, 2061.

7. Forgery ⚷37
Larceny ⚷43

In prosecution for grand theft and forgery, where evidence showed that dealer obtained money from finance company on the strength of specific sales contracts, two of which were forged, and all of which were assigned to the company, proof of a general course of business between dealer and finance company to show that dealer had a purchasing account on which money was advanced without a specific contract was properly rejected.

8. Witnesses ⚷270(2)

Objection to question asked by district attorney on cross-examination of a witness for defendant as to whether witness knew what perjury was, was properly sustained.

9. Witnesses ⚷274(1)

A district attorney may in good faith cross-examine a character witness as to his knowledge of specific acts inconsistent with the character testified to, but such cross-examination is not authorized if its purpose is to intimate that defendant has been guilty of specific acts of misconduct, when the attorney has no basis for a reasonable belief that the fact is as implied by the questions.

10. Criminal law ⚷1171(1)

Where the misconduct of a prosecuting attorney in improperly cross-examining a character witness operates to prejudice the substantial rights of a defendant, appellate courts are disposed to reverse the conviction.

11. Criminal law ⚷730(3)

Where the misconduct of a prosecuting attorney in improperly cross-examining a character witness is of such a nature that an admonition from the court will not cure the injury, the defendant need not request the court to instruct the jury to disregard the questions asked, the statements made, or the answers given.

12. Criminal law ⚷1144(15)

The District Court of Appeal will assume that the jury heeded the court's admonition to disregard questions, objections to which had been sustained.

13. Criminal law ⚷706, 1037(2)

In prosecution for grand theft and forgery, where court instructed jury to disregard questions to which objections had been sustained, cross-examination of defendant as to whether certain conduct of his had not been for purpose of avoiding prosecution and cross-examination of a character witness as to whether his answer would be the same if examiner told him that defendant was arrested for robbery, whereas there was no evidence of robbery, constituted "misconduct," but was not ground for reversal, in absence of a request that jury be admonished to disregard the questions. Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Misconduct," see Words & Phrases.]

14. Criminal law ⚷1186(4)

Where evidence showed that dealer had obtained money and property from finance company by fraudulent representations and by the presentation of fictitious contracts, and warranted conclusion that no other verdict than guilty could have been reached even if alleged misconduct of district attorney had not been committed, the District Court of Appeal was required to affirm the conviction. Const. art. 6, § 4½.

15. Criminal law ⚷1186(4)

The District Court of Appeal is not authorized to reverse a conviction unless error has been committed depriving defendant of a fair trial or unless verdict has resulted in a miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Angelo M. Young was convicted of grand theft and of forgery, and he appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

John Leo Harris and Malcolm Harris, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

WHITE, Justice.

The defendant was convicted of the offense of grand theft, as charged in an amended information, and also was found guilty on two counts of forgery, as alleged in a separate information, both pleadings having been consolidated for trial before the same jury. From the judgments aforesaid and the order denying his motion for a new trial, defendant prosecutes this appeal.

In urging a reversal, appellant asserts that the evidence was insufficient to warrant the jury in finding him guilty of any of the charged offenses; that the court erred in refusing to permit him to show the general course of business relations that had existed between defendant and the finance company alleged to have been defrauded, for some time prior to the dates of the transactions here in question; and, finally, that the district attorney was guilty of prejudicial misconduct during the examination of certain defense witnesses.

With reference to the charge of grand theft, the testimony discloses that appellant was engaged in the business of selling radios, refrigerators, and electrical appliances in the city of Los Angeles under the firm name of Angelus Radio Shop. Part of the premises occupied by appellant's business was leased to the Citizens Insurance Agency, which latter company was engaged in the business of discounting commercial paper, such as installment sales contracts, by advancing money upon and taking assignments of such paper. From evidence introduced on behalf of the prosecution, it appears that about March 10, 1936, one Cohen placed an order with appellant for an electric refrigerator, and gave to appellant as a deposit a check for $55. So far, the negotiations were oral, and it was agreed at that time that the refrigerator would be delivered in thirty days. On the following May 1, Cohen gave to appellant the balance due on the contract for the delivery of the refrigerator, being the sum of $305, at which time it was agreed that the refrigerator should be delivered immediately. However, delivery was not made to Cohen by appellant until August 21, 1936. The case number of the electric refrigerator delivered to Cohen, the materiality of which will become apparent herein, was 5359351. The evidence of the prosecution then discloses that about August 20 or 21, at about the time appellant caused delivery of the aforesaid refrigerator to Cohen, the former approached a Mr. and Mrs. Ferguson with reference to their purchasing an electric refrigerator. After signing a contract for the purchase of such a refrigerator, the Fergusons came to appellant, and, in accordance with their option to cancel such contract, stated that they desired to terminate the deal, whereupon appellant signed a cancellation of the Ferguson contract. Although the refrigerator had never been delivered to the Fergusons, appellant represented to the discount company that delivery had been made, and that the purchase contract was in full force and effect. The materiality of the case number of the refrigerator now becomes apparent, because the Ferguson contract which appellant presented to the finance company, and upon which the former received a check for $337.05 from the latter after assigning the contract to the discount company, was for a refrigerator bearing case number 5359351, which was the number of the refrigerator appellant had previously delivered to Cohen. Thus we see from the evidence introduced by the prosecution, appellant obtained $337.05 from the finance company upon a canceled contract and upon a refrigerator he had previously delivered to Cohen, and for which Cohen had paid him in full.

With respect to the evidence introduced by the prosecution in support of count I of the separate information charging forgery, the same had to do with a contract between appellant's Angelus Radio Shop and one R. H. Rhea. This evidence was to the effect that appellant represented to the finance company that Rhea was employed in the office of the Los Angeles city auditor; that Rhea wanted a refrigerator, but did not have the money with which to buy it; that if the finance company would give appellant the money with which to buy the machine for Rhea, that the latter would sign a conditional sales contract, which instrument appellant stated he would give to the finance company to secure the money obtained with which to purchase the refrigerator. Subsequently, after stating to the finance company that the refrigerator had been delivered to Rhea, appellant brought in the contract. For this contract appellant was given a check for $116.58. Later, when the contract became delinquent, and appellant was asked by the finance company agent why the first payment thereunder was not made, appellant stated he would contact Rhea, obtain the payment from him, and bring it in; and appellant did bring in a payment on the Rhea contract. When the second payment became delinquent, the same procedure was gone through. The refrigerator number inserted by appellant in the Rhea contract was 6256876. There is substantial evidence in the record to indicate that on

July 31, 1936, nearly a month before the execution of the Rhea contract, the General Electric Supply Corporation sold to appellant's Angelus Radio Shop an electric refrigerator bearing the same number that was inserted by appellant in the Rhea contract. There was testimony that no one by the name of Rhea was living on the property located at the address given in the contract, and that there was no employee in the Los Angeles city auditor's office by the name of Rhea on or about the date charged in the information or at any other time during the past nineteen years. It further appears from the testimony of certain police officers that a diligent search of the records of the city of Los Angeles directories, telephone books, etc., failed to disclose a person by the name of R. H. Rhea. The witness O'Callahan, as a representative of the finance company, testified that he believed the Rhea contract was bona fide and that he relied upon the representations of appellant in reference thereto, for which reason, he testified, he gave appellant the check for the contract.

With reference to count II of the second or separate information, the prosecution introduced evidence that on or about August 1, 1936, appellant told the finance company that he could sell an electric refrigerator to a certain Willard D. Robins; and that he needed the money to buy the refrigerator. According to the evidence, appellant further stated that he had known Robins for some time; that the latter worked for the Los Angeles Paper Box Company and would undoubtedly make the payments on his contract. This conversation took place during the latter part of July. It was testified that on or about August 1, 1936, appellant brought in a contract to the finance company, this contract being between the appellant's Angelus Radio Shop and Robins, for an electric refrigerator, and at that time appellant assigned the contract to the finance company, telling the representative thereof that the refrigerator had been delivered. Robins' name and also his address were on the contract at that time. Prior to that time, according to certain evidence, and upon appellant's promise to bring in the contract, the latter obtained from the finance company the sum of $121.68. It further appears that three payments were made on the Robins contract, which payments were delivered to the finance company by appellant. The finance company's authorized agent testified that he believed the Robins contract was bona fide and that he relied upon the representations made by appellant, for which reason he gave appellant the money above referred to. From certain of the testimony, it appears that no one by the name of Willard D. Robins worked for the Los Angeles Paper Box Company during the month of August, 1936, or during the month of July, 1936, or at any time as far back as January 31, 1934.

[1-6] It is obvious, from the circumstances of this case and the testimony which has been recited, that the jury were reasonably justified in drawing the inference that all three of the transactions charged in the information were fraudulent and fictitious, and were had for the sole purpose of enabling the appellant, on the strength of apparently bona fide sales, to secure for himself the moneys in question. The question of intent is one for the jury; and where the evidence, as here, is such that the jury could reasonably draw therefrom the inference of guilty intent, its verdict cannot be disturbed by the appellate tribunal. People v. Remsberg, 92 Cal.App. 615, 617, 268 P. 672; People v. Swalm, 80 Cal. 46, 49, 22 P. 67, 13 Am.St.Rep. 96; People v. Rushing, 130 Cal. 449, 62 P. 742, 80 Am.St.Rep. 141. While it is true that evidence in conflict with the foregoing was presented by the appellant, who also testified in his own behalf, nevertheless it was the jury's right to reject appellant's denial of any wrongdoing and to accept, as well as act upon, the testimony of witnesses who contradicted him. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution, art. 6, § 4½, provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses, Code Civ.Proc., § 1847, and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive.

Code Civ.Proc., § 2061. It necessarily follows from the rules just noted that the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been given contradictory to that produced by the prosecution and herein set forth. People v. Phelan, 123 Cal. 551, 557, 56 P. 424; People v. Wright, 4 Cal.App. 704, 706, 89 P. 364; People v. Turpin, 10 Cal. App. 526, 630, 102 P. 680; Clark v. Tulare L. D. Co., 14 Cal.App. 414, 432, 112 P. 564.

[7] Appellant's second contention, that the court erred in refusing to permit him to show the general course of business between himself and the finance company, is equally without merit. The offer of proof made by appellant at the trial indicates that he proposed to show that for some two years prior to the dates mentioned in the informations, he had what he termed a "purchasing account" with the finance company, through which he was permitted to borrow money with which to purchase refrigerators, radios, etc.; that when money was paid to appellant by the finance company it was not paid upon or by reason of a specific contract, and therefore that no money was parted with by the finance company because of any representations made of or concerning any specific contract. The ruling of the trial court sustaining objection in the proffered proof was correct, because there was clear and unequivocal evidence showing definitely that the moneys mentioned in the information were given for certain specific contracts, and, further, that the contracts were assigned to the finance company. The evidence also shows without contradiction that the contracts set forth in two counts of the information were fraudulent and fictitious. This state of the record effectually concludes appellant's contention and argument in this particular. The evidence was immaterial and incompetent, and properly rejected.

[8] Appellant finally contends that the district attorney was guilty of prejudicial misconduct during his cross-examination of defense witnesses. Opening the cross-examination of a witness called on behalf of the defendant, the district attorney inquired, "Do you know what perjury is?" to which the witness responded in the affirmative. Upon objection, the court properly sustained the same, and struck the answer from the record. During the cross-examination of appellant concerning delivery of the refrigerator in the Cohen transaction, the district attorney propounded the following interrogatory: "And it was not because Mr. Cohen agreed to call off any prosecution against you if you delivered that immediately, was it?" A timely objection interposed by appellant's counsel was promptly sustained. Notwithstanding the court's action in sustaining this objection to the foregoing question, the district attorney persisted in asking the following: "And the reason you delivered it was because you were called into the district attorney's office by Mr. Cohen, is that correct?" Again the court sustained defendant's objection. On another occasion, when defendant denied having a certain conversation, the district attorney asked, "Then this is not true?" to which query objection was made and sustained. During the cross-examination of a character witness called in behalf of defendant, the following occurred: "Q. Would your answer be the same if I told you that this defendant was arrested for robbery?" Objection to this question was sustained.

[9-11] As indicated by the rulings of the trial court, these questions were improper, and in two instances, particularly as to the last interrogatory, neither ignorance nor zeal justifies or excuses the asking thereof. The evil thereof was accentuated by the fact that appellant had admitted on cross-examination a prior conviction of the crime of forgery, in the face of which it was highly improper for the district attorney to insinuate or imply to the jury by his question that the appellant had also been arrested for robbery, when, so far as the record here discloses, there was not a scintilla of evidence to support the implication sought to be conveyed to the jury that appellant had been arrested for robbery. While a district attorney may in good faith cross-examine a witness to a defendant's character with reference to his knowledge of specific acts inconsistent with the character testified to, it is highly improper for him to ask such questions where it is apparent that his sole purpose is to get before the jury the intimation that the defendant has been guilty of specific acts of misconduct, when the prosecuting officer has no information warranting a reasonable belief upon his part that the fact is as implied by the questions; and where such misconduct operates to prejudice the substantial rights of a defendant, appellate courts are disposed to reverse judgments of

conviction. There are cases where the misconduct is of such a nature that an admonition from the court would not serve to effectually cure the injury and prejudice resulting therefrom. In such cases, it is not required that a defendant request the court to instruct the jury to disregard the questions asked, the statements made, or the answers given. The misconduct here set forth is not of that character, and it was therefore incumbent upon appellant to request the trial judge to so admonish the jury. The questions were improper and the action of the district attorney in asking some of them was an act of misconduct on his part; but the record shows that the court in each instance sustained the defendant's objection to the question, and further shows that while the defendant's counsel in some instances assigned the acts of the district attorney as misconduct, at no time was a request made of the court to admonish or instruct the jury to disregard the same. Notwithstanding this, the court gave the jury the following instruction: "* * * But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out, entirely, and if any counsel has intimated by questions, which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inferences based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are. * * *"

[12-14] It is to be assumed that the jury heeded this admonition, with respect not only to the precise questions here set forth, but also as to any other questions of doubtful propriety respecting which objections were made and sustained by the court. People v. Burke, 18 Cal.App. 72, 122 P. 435; People v. Fodera, 33 Cal.App. 8, 13, 164 P. 22. It is sufficient to say that the evidence sought to be elicited was incompetent and its proffered introduction by the district attorney improper, but that the court promptly sustained an objection to it and that the defendant did not ask for an instruction that the jury disregard it. The error and impropriety of its offer in evidence must therefore be held to have been cured by the foregoing instruction of the court in its final charge to the jury. Moreover, under section 4½ of article 6 of the Constitution, it would be our duty to affirm the judgment of conviction. The evidence shows beyond all question that appellant obtained the money and property of the finance company by false and fraudulent representations, and by the presentation of fraudulent and fictitious contracts. The evidence herein recited and other facts disclosed upon a review of the entire record, including the evidence, so far from showing that there has been a miscarriage of justice, tend strongly to prove the guilt of appellant, and that no other verdict could have been reached if the alleged misconduct of the district attorney had not been committed.

[15] After reviewing the entire record, including the transcript of the evidence, we do not find that any error has been committed in the trial of the action which has deprived appellant of the fair trial to which he is entitled, nor do we believe that the verdict has resulted in a miscarriage of justice; consequently we are without authority to disturb the jury's finding.

The judgments and orders appealed from are therefore affirmed.

We concur: YORK, P. J.; DORAN, J.

25 Cal.App.2d 241

PEOPLE v. SMITH.

Cr. 3042.

District Court of Appeal, Second District,
Division 1, California.
March 4, 1938.

1. Homicide ⚷232

Premeditation need not be shown by express evidence of deliberate purpose to kill, but may be inferred from proof of such facts as will reasonably warrant an inference of its existence.

2. Homicide ⚷14(2)

There need be no appreciable space of time between the intention to kill and the act of killing, and it is only necessary that the act of killing be preceded by concurrence of will, deliberation, and premeditation on part of the slayer to make the offense of "first degree murder."

[Ed. Note.—For other definitions of "Murder in First Degree," see Words & Phrases.]

3. Homicide ⚷253(3)

Evidence that accused deliberately shot deceased while deceased was fleeing from attack by accused under circumstances warranting an inference of malice sustained conviction of murder in first degree.

4. Criminal law ⚷475

In prosecution for murder, testimony of physicians as to course of bullet in deceased's body as disclosed by physical examination of damage done to deceased's body by bullet as it passed through him was not open to objection that there was no foundation laid for ballistic testimony, since question of ballistics was not involved.

5. Criminal law ⚷475

In prosecution for murder, opinion testimony of ballistics expert, whether gun could have been discharged from a certain position behind deceased's back so as to have caused wound which was inflicted on deceased, was properly excluded where there was no question as to where the bullet entered the body of deceased.

6. Criminal law ⚷475

In prosecution for murder, where theory of prosecution was that deceased was shot in back at a distance of 20 feet and accused contended that deceased was shot in the back in scuffle for the gun, testimony of ballistics expert, based on examination of fatal bullet and knowledge of ballistics as to distance from which shot was fired, would have been competent.

7. Witnesses ⚷393(3)

Where witness in murder prosecution testified that deceased had large bump on forehead and that accused told officers at the scene of homicide that he did not shoot deceased but that he beat him, offer to impeach witness by record of preliminary hearing, which did not indicate that witness was asked concerning statements of accused or the appearance of any injury upon the body of deceased, was properly refused.

8. Criminal law ⚷366(3), 407(2)
Homicide ⚷200

In murder prosecution, statements of deceased, made in presence of accused, are admissible only when it is part of the res gestæ or as a dying declaration or as an accusatory statement made in the presence of defendant upon an occasion such as afford accused an opportunity to speak when statement is one calling for some action or reply.

9. Criminal law ⚷407(2)

In prosecution for murder, statement of deceased that accused beat him and shot him, which was not admissible as part of the res gestæ or as a dying declaration because no proper foundation was laid therefor, would be admissible only for purpose of showing the demeanor and actions of accused in face of an accusatory statement, which, if denied by accused, rendered statement inadmissible for any purpose.

10. Witnesses ⚷388(8)

Where accused in murder prosecution offered no proper foundation for impeachment of witness and offered no testimony that witness gave testimony in conflict at preliminary hearing in connection with any matter about which he was interrogated, objection to record of preliminary hearing offered by way of impeachment of witness was properly sustained.

11. Criminal law ⚷1023(10)

An attempted appeal from a sentence would be dismissed since no appeal lies from the sentence.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Claude J. Smith was convicted of murder in the first degree, and from the judgment, sentence, and order denying new trial, he appeals.

Affirmed.

Gladys Towles Root and David B. Larimer, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

WHITE, Justice.

The defendant, who was charged with the crime of murder, was convicted of murder in the first degree. The jury, which returned the verdict of guilty, recommended that the defendant be sentenced to life imprisonment. The trial court denied defendant's motion for a new trial and pronounced judgment whereby defendant was sentenced to life imprisonment. From the judgment, sentence, and from the court's order denying his motion for a new trial, defendant appeals.

Appellant contends that the evidence is insufficient to sustain the verdict of murder in the first degree. Examination of the record impels the conclusion that appellant was properly convicted of murder in the first degree. The transcript shows that evidence was submitted to the jury which tended to prove that the deceased was a roomer in the home of appellant; that about 1:30 on the afternoon of the homicide, deceased was seen running out of appellant's house; that after he had traveled about twenty feet, appellant appeared in the doorway, and simultaneously therewith a shot was fired. It was further shown that deceased received a gunshot wound in the small of the back, from the effects of which he died some five weeks later. It was also testified that a short time after the shot was fired, the deceased was seen getting up from the ground, while appellant was standing over him. The latter held a gun in his hand. There was also evidence that after the deceased got to his feet, appellant pointed the gun at deceased's back, and the two men walked back into the house. Some five minutes later, appellant was observed to drag deceased out of the house and throw him "into the curbing." Appellant stood over deceased with a gun in hand, saying to deceased, "Get up and walk," to which the deceased replied: "I can't walk. You will kill me." When the officers arrived, appellant, with a gun in his hand, was still standing over deceased. When taken from appellant by the officers, the gun contained five loaded cartridges and one empty cartridge. The smell of freshly burned powder indicated that the gun had recently been fired, which fact was affirmed by appellant in the presence of the officers. When, in the presence of appellant, the deceased accused the former of having shot him, appellant remained mute.

[1, 2] The above recital of evidence which was introduced during the trial demonstrates the futility of appellant's contention that the offense of which he was guilty was less serious than that of which he was convicted, and also negatives his claim that while defending himself from attack by the deceased, and while the latter was in possession of the gun, the weapon was accidentally discharged during a scuffle for its possession. The principle is well established that express evidence of a deliberate purpose to kill is not required to warrant a verdict of guilty of murder in the first degree. The necessary element of premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference. People v. Mahatch, 148 Cal. 200, 202, 82 P. 779; People v. Machuca, 158 Cal. 62, 64, 109 P. 886; People v. Bennett, 161 Cal. 214, 218, 118 P. 710; People v. Erno, 195 Cal. 272, 278, 232 P. 710. It has often been said that: "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree, no matter how rapidly these thoughts of the mind may succeed each other, or how quickly they may be followed by the act of killing." People v. Bellon, 180 Cal. 706, 710, 182 P. 420, 422.

[3] Appellant testified that the revolver from which the fatal shot was fired was accidentally discharged while held in the hand of deceased in back of him during a scuffle wherein appellant sought to disarm his alleged assailant. The verdict of conviction indicates that the jury rejected appellant's explanation of the homicide and arrived at the conclusion that he shot the victim with malicious deliberation while the latter was fleeing from attack by appellant. It requires something more than optimism to argue that the jury was not warranted

in drawing an inference of malice from the circumstances which surrounded the homicide in this case.

[4] Appellant's second contention is that the trial court erred in overruling his objections to certain evidence and sustaining objections interposed by the district attorney to certain testimony offered by the defense. During the trial medical testimony was produced from the physician who performed an operation upon the deceased prior to his death and by the surgeon who performed the autopsy. Appellant objected to certain of this testimony concerning the course of the fatal bullet after it entered the body of deceased on the ground that "there is no foundation laid for any ballistic testimony," which objection was overruled. This ruling was correct. No question of ballistics was involved. The doctors were testifying as to the actual conditions they found in the body of deceased during the performance of an operation and an autopsy. They were testifying to existing physical facts regarding the injuries sustained by reason of the gunshot wound. They traced the course of the bullet only in so far as their physical examination disclosed perforation of or damage to various organs of the body touched by the bullet as it passed through the deceased. Their testimony went to the nature of the injuries caused by the bullet, concerning which they were as competent to testify as they were, for instance, concerning the cause of death. The question of ballistics was not even remotely involved.

[5, 6] During the trial appellant produced a qualified ballistics expert, from whom he sought to elicit testimony of an expert nature as to whether, in the opinion of the expert, assuming the gun was held as testified by appellant in the right hand of deceased, which hand was forced to his back by appellant, that the gun could have been fired while in that position in such a manner as to have caused the wound which deceased received in his back within two inches of the center thereof. The court properly sustained the objection to this line of testimony. There was admittedly only one bullet wound, and consequently no question as to where the bullet entered the body of deceased. Had the ballistics expert been asked for his opinion, based on his examination of the fatal bullet and his conceded knowledge of ballistics, as to the distance from which the shot was fired, his answer would have been competent and possibly helpful evidence, in view of the claim of defendant that the gun was discharged while held within a few inches of the deceased's back, and the theory of the prosecution that the deceased was shot at a distance of some twenty feet from where appellant was standing.

[7] Appellant's final contention is that the trial court was guilty of error in sustaining an objection to testimony proffered by way of impeachment of a police officer. The record indicates that at the trial an officer testified that there was a large bump on the forehead of deceased, and also that appellant told the officers at the scene of the homicide that he did not shoot the deceased, but that he "beat the hell out of him." Appellant then attempted to impeach such testimony by asking the witness if he so testified at the preliminary examination, to which question an objection was sustained; whereupon appellant read into the record certain testimony given at the preliminary hearing, with an offer to prove thereby that nothing was said by the witness concerning any conversation about "beating the deceased, or of any appearance of physical violence upon the deceased except a bullet wound in the lower part of his back." To this offer of proof the trial court sustained an objection. This ruling was proper, because the record does not indicate that at the preliminary examination the witness was directly asked concerning the appearance of any injury upon the body of the deceased other than the bullet wound; while with reference to any conversation, the transcript shows that at the preliminary examination the witness sought to be impeached testified to a conversation with deceased in the presence of appellant as follows: "We asked him, 'Why did he shoot you?' He said, 'He accused me of taking his purse.' We said, 'Did you take his purse?' And he said, 'No, I didn't take his purse, and I tried to tell him that, but he beat me over the head and then shot me.'"

[8, 9] In disposing of this question, we must not be understood as overlooking or departing from the well-established rule that such evidence of statements made in the presence of a defendant is admissible only upon three theories: First, that it is part of the res gestae; second, as a dying declaration; and, third, as an accusatory statement made in the presence of the defendant upon an occasion and under cir-

cumstances such as afford the accused person an opportunity to act or speak, and when the statement is one naturally calling for some action or reply. It is at once apparent that the statement aforesaid is not admissible on the first two stated grounds, because no proper foundation was laid therefor; and upon the last-named ground such evidence is never admissible as proof of any fact, but solely for the purpose of showing the demeanor and actions, if any, of the defendant in the face of an accusatory statement; and when such accusatory statement is promptly denied by the defendant, it is inadmissible for any purpose.

[10] Further, no proper foundation was laid for impeachment, nor did the testimony offered tend to show that at the trial the witness gave testimony at variance or in conflict with testimony given at the preliminary hearing in connection with any matter about which he was interrogated.

[11] Since no appeal lies from the sentence, the attempted appeal therefrom is dismissed.

For the reasons stated, the judgment and order from which this appeal is taken are affirmed.

We concur: YORK, P. J.; DORAN, J.

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25 Cal.App.2d 222

ELLERY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10719.

District Court of Appeal, First District,
Division 1, California.

March 2, 1938.

1. Constitutional law 🔑83(3)

A judgment for separate maintenance requiring husband to pay wife a certain sum per month together with counsel fees and costs incurred in divorce action is not a "debt" within meaning of constitutional section securing a citizen against imprisonment for debt. Const. art. 1, § 15.

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

2. Divorce 🔑269(2)

The duty of support, though not technically a "debt," is an obligation which may be enforced by contempt.

3. Divorce 🔑269(14)

Where a husband, upon failure to pay alimony to his wife, was adjudged guilty of contempt and committed to sheriff's custody, if husband after his commitment became unable to comply with court order to make payment, superior court for city and county of San Francisco had jurisdiction, under statute, to consider husband's application for an order discharging him from custody. Code Civ.Proc. § 1143 et seq., as amended.

4. Mandamus 🔑172

Where superior court properly entertained jurisdiction of a husband's application for an order discharging him from sheriff's custody on ground that he was unable to comply with order to pay alimony to his wife, error, if any, in court's proceedings admitting husband to bail pending determination of application could not be reviewed in mandamus proceeding brought to compel dismissal of application and remand of husband to custody. Code Civ.Proc. § 1143 et seq., as amended.

◆

Original mandamus proceeding by May J. Ellery against the Superior Court of the State of California in and for the City and County of San Francisco, to compel dismissal of the application of William Ellery for an order discharging him from the custody of the sheriff and to compel the remand of William Ellery to the custody of the sheriff.

Prayer of petition denied, and writ dismissed.

Nathan C. Coghlan and Walter C. Frame, both of San Francisco, for petitioner.

Charles N. Douglas, of San Francisco, for respondent.

PER CURIAM.

A proceeding in mandamus. Petitioner brought her action for divorce from William Ellery in respondent superior court, in which she was granted a judgment for separate maintenance, requiring her husband to pay a certain sum per month, together with counsel fees and costs. He failed to pay the maintenance awarded, and subsequently, upon an order to show cause why he should not be punished for contempt, he was ordered to pay a sum on account thereof forthwith, which he also failed and refused to do, whereupon he was adjudged guilty of contempt, committed to the custody of the sheriff, and ordered confined in the county jail until the amount last referred to should be paid. He thereupon applied to the District Court of Appeal of the First District for release on habeas corpus, which court on August 10, 1937, sustained the commitment, and he was remanded to the custody of the sheriff. Ex parte Ellery, Cal.App., 70 P.2d 690.

On or about August 13, 1937, he filed in respondent court, pursuant to section 1143 et seq. of the Code of Civil Procedure, as amended, an application for an order discharging him from custody. Respondent court entertained the application and admitted the applicant to bail. The present proceeding in mandamus was brought to compel dismissal of the application and the remand of the applicant to the custody of the sheriff on the ground that respondent is without jurisdiction in the premises.

Petitioner contends that the judgment for maintenance is not a debt and, therefore, the Code provisions above mentioned have no application.

[1, 2] It is well settled that such a judgment is not a debt within the meaning of section 15 of article 1 of the Constitution, which secures a citizen against imprisonment for debt. Nevertheless the duty of support, though not technically a debt, is an obligation which may be enforced by the process of contempt. Ex parte Perkins, 18 Cal. 60; Livingston v. Superior Court, 117 Cal. 633, 49 P. 836, 38 L.R.A. 175. In Re Application of Wilson, 75 Cal. 580, 17 P. 698, the question here presented was determined. There it was held that the petitioner, who in a divorce action had been ordered to pay alimony and committed for contempt on his failure to pay, was in custody under an execution, and would be entitled to his discharge under the code sections cited upon proof establishing his subsequent inability to comply with the order. The rule thus declared was referred to with tacit approval in Spencer v. Lawler, 79 Cal. 215, 21 P. 742; Ex parte Batchelder, 96 Cal. 233, 31 P. 45; and Ex parte Levin, 191 Cal. 207, 215 P. 908. See, also, 1 Cal.Jur., Alimony and Maintenance, § 108, p. 1061.

[3] In this connection In re Pillsbury, 69 Cal.App. 784, 785, 232 P. 725, is cited and relied upon by petitioner; but an examination of the case shows that what was said to the contrary was unnecessary to the decision. We think it clear that the code sections apply to cases of this character; and if it be established that Ellery since his commitment has become unable to comply with the order of court, respondent has jurisdiction to entertain his application for discharge.

[4] The question of the power of the court to admit him to bail pending a determination of the application we need not consider, as respondent having entertained jurisdiction of the application—and properly so as we think—and having acted in the above particular judicially, its proceedings, if erroneous, may not be reviewed in a proceeding in mandamus. 16 Cal.Jur., Mandamus, § 35, p. 822.

The prayer of the petition is denied and the writ dismissed.

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25 Cal.App.2d 133

CRESCENT CITY v. MORAN, City Treasurer.

Civ. 6019.

District Court of Appeal, Third District, California.

Feb. 21, 1938.

Hearing Denied by Supreme Court April 14, 1938.

1. Taxation 🔑25

Unless restrained by some provision of State Constitution, the Legislature has plenary power in relation to the subject of taxation.

2. Constitutional law 🔑186

Retrospective legislation in civil matters is not unconstitutional.

3. Municipal corporations 🔑911

Where public improvement, including paving of streets and construction of curbs and sidewalks, was of such nature that city might have assumed expense thereof instead of dividing city into acquisition and improvement districts, city could issue bonds for purpose of purchasing at a discount bonds and unpaid coupons of acquisition and improvement districts. St.1925, p. 849, as amended; St.1937, pp. 1468–1471, §§ 1–5, 7.

4. Constitutional law 🔑143

The statute authorizing city to issue bonds for purpose of purchasing or redeem-ing bonds of financially distressed improvement districts within city does not violate obligation of contracts, for although the improvement district bonds constitute "contracts," the statute is merely permissive so far as bondholders are concerned. St.1937, pp. 1468–1471, §§ 1–5, 7.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

5. Municipal corporations ⚷907

The statute authorizing city to issue bonds for purpose of purchasing at discount bonds and coupons of financially distressed improvement districts within city does not violate Constitution prohibiting giving or lending of credit or making of gift, notwithstanding holders of improvement bonds and owners of property were incidentally benefited, since purpose of statute was the restoring to tax rolls of city the property which had become delinquent by reason of excessive burdens of improvement bonds. St.1925, p. 849, as amended; St.1937, pp. 1468–1471, §§ 1–5, 7; Const. art. 4, § 31.

6. Courts ⚷91(1)

The District Court of Appeal is under duty to follow decisions of Supreme Court.

7. Constitutional law ⚷289

The statute authorizing city to issue bonds for purpose of purchasing at discount bonds and coupons of financially distressed improvement district within city does not constitute taking of property of taxpayer within city without due process of law. St. 1925, p. 849, as amended; St.1937, pp. 1468–1471, §§ 1–5, 7.

8. Municipal corporations ⚷957(3)

The statute authorizing city to issue bonds for purpose of purchasing at discount bonds and coupons of financially distressed improvement district within city does not constitute a burden of double taxation. St. 1925, p. 849, as amended; St.1937, pp. 1468–1471, §§ 1–5, 7.

◆

Proceeding by the Crescent City against J. J. Moran, as Treasurer of Crescent City, to compel the respondent to sign certain bonds voted by the people of the city.

Writ of mandate granted.

Chickering & Gregory, of San Francisco, for petitioner.

Taylor F. Peterson, of Eureka, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

For the purposes of convenience the plaintiff hereafter will be referred to as "city."

This cause is before us upon an application of the city to compel J. J. Moran, as treasurer of the city of Crescent City, to sign certain bonds in the sum of $175,000 voted by the people of said city on September 28, 1937. The purposes for which said bonds were voted were set forth upon the ballot, and are in substance as follows:

"Shall the City of Crescent City incur a bonded indebtedness of $175,000.00 for the purpose of purchasing at a discount the bonds and unpaid coupons thereon, of Acquisition and Improvement District No. 1 and Acquisition and Improvement District No. 2, as specified in a resolution passed and adopted by the City Council of the City of Crescent City on the 26th day of July, 1937?"

The record shows that at the election held pursuant to the resolution of the city council of the city, the propositions submitted by the resolution of the city council were approved by the voters of said city by the following vote: 625 in favor of the proposition submitted, and 85 in opposition thereto.

The respondent declines to sign the bonds referred to, basing his opposition thereto on the alleged ground that the act of the legislature known as "Chapter 494, approved June 21, 1937, Statutes of 1937, page 1468," is unconstitutional. The signing of the bonds on the part of the respondent being purely ministerial, if the act in question is found to be constitutional a writ of mandate should issue.

Section 1 of the act of the Legislature, supra, page 1468, provides that in all cases where bonds have been issued under the provisions of the Acquisition and Improvement Act of 1925, St.1925, p. 849, and amendments thereof for the payment of the costs of any public improvement made, etc., within the territorial limits of any city, the city council shall have the right and the power to purchase or redeem at a discount such bonds and interest coupons thereon. The purchase of the bonds and coupons may be carried out upon such terms and in such manner as the city council may deem most convenient, etc.

Section 2 of the act, page 1469, authorizes such city to contribute such amount of money to the interest and sinking fund of such district or districts as, in the judgment of said city council should be transferred to accomplish the purposes and objects of this act.

Section 3, page 1469, authorizes the levying of a tax to provide for carrying out the purposes of the act; also provides for the issuance of bonds under and in accordance with the law relating to the issuance of bonds by cities, subject to the provisions of section 20 of article 11 of the State Constitution; provides for the calling of an election for the issuance of bonds by the city, and the manner of submitting the question of the issuance of bonds to the voters of the city.

Section 4, page 1470, provides for the passing of resolutions by the city council by a four-fifths vote thereof, declaring that to be for the convenience and necessity of the city and the interest of the city will be served and promoted by the expenditure by said city for the purposes set forth in the act.

Section 5, page 1470, provides that bonds and coupons may be purchased or redeemed at a price not exceeding 80 per cent of the face value thereof.

Passing to section 7 of the act, page 1471, we find the purposes stated in the following language: "The purpose of this act is to provide a complete scheme whereby any financially distressed and delinquent or insolvent district or districts created under the provisions of the Acquisition and Improvement Act of 1925 and amendments thereof may be refunded or the bonded indebtedness thereof adjusted with the financial aid of the city in which the same may be situated and without the necessity or expense of destroying the structure or operation of such district, and without issuing refunding bonds or reassessing the same under any assessment refunding statute."

No question being raised as to the regularity of the preliminary proceedings leading up to the issuance of the bonds, we can pass to the question of the constitutionality of the statute authorizing cities to issue bonds for the purposes therein mentioned.

The record before us shows that the two districts mentioned comprise practically all of the territory within the limits of the city; that while the two districts were formed, the work for which the bonds of the districts were issued was of a public nature, and was essentially for the benefit of the entire city, and not particularly for the benefit of the residents of the particular districts.

Some ten or twelve years ago the city undertook a program of public improvements, including the paving of streets, construction of curbs and sidewalks, incurring an expenditure of approximately $265,000. For the payment of this work special assessment districts were formed and bonds were issued under the Acquisition and Improvement Act of 1925, payable from special assessments against the properties in the respective districts. These assessments have proven so heavy that a large number of the taxpayers appear to have been unable to pay the assessments and the taxes for other purposes levied upon the lands of the district, so that on or about the first of the year of 1937, both of the districts were in default in the payment of principal and interest to the extent of about 35 per cent., that portion of the property lying within the respective districts being allowed to go delinquent. The problem of the city has become acute, due to the fact that the two assessment districts, comprising substantially all of the property within the corporate limits of the city, causes a corresponding delinquency in the tax rolls of the city, leaving the city in a serious condition as to being able to raise sufficient funds to carry on the purposes for which the city was incorporated, including the expenses ordinarily necessary to be incurred by an incorporated city. These particular purposes we need not specify.

[1] Unless restrained by some provision of the State Constitution, it would appear that the Legislature has plenary power in relation to the subject of taxation. This rule is clearly stated in 24 California Jurisprudence, p. 44, § 27, as follows: "The Constitution, so far as it deals with the subject of taxation, is not a grant of, but a limitation upon the power of the legislature, and that body has the entire control and management of the fiscal affairs of the State, having plenary and unlimited power respecting the subject of taxation, except as restricted by the Constitution itself." This rule is set forth in Re Higgins, 50 Cal.App. 533, 195 P. 740, 742, in these words: "What things are subject to taxation, and the amount and method of levying and collecting taxes are essentially matters of legislative concern with which the courts will not interfere unless some provision of the Constitution is clearly violated."

To the same effect is the case of Beals v. Board of Supervisors of Amador County, 35 Cal. 624.

As we shall hereafter point out, under the different acts of the Legislature referred to it was competent for the city to fix the burden of the expense of the improvements undertaken, upon all of the property situate within its corporate limits; that is, the city as a city might have assumed the expense of making the public improvements heretofore mentioned instead of dividing the city into acquisition and improvement districts. That the work mentioned was and is of a public character was alike beneficial to all of the residents of the city, and also an improvement tending to enhance the value of all of the property of the city, needs only a statement thereof to support its public character and as being work that might have originally been paid for by the city, or the expense thereof originally assumed by the city. This would have placed the burden thereof upon all of the property lying within the exterior boundaries of the municipal corporation.

We find nothing in the Constitution prohibiting retrospective legislation relative to the subjects which we are considerng. It follows, therefore, that what the city might have done originally, it is, under the act of the legislature approved June 21, 1937, empowered to do now.

[2] Finding that the pecuniary interest of a city has been seriously disadvantaged by the method of paying for the public improvement, which affects all of the property within the city and all of the citizens within the city, there appears to us to be no constitutional objection to the rectification of the mistake originally made in dividing the city into two acquisition and improvement districts. That retrospective legislation in civil matters is not unconstitutional is supported by the following cases: Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298; McCann v. Jordan, 218 Cal. 577, 24 P.2d 457.

In Cooley on Taxation, 3d Ed., vol. 1, p. 492, it is thus stated: "Unless the Constitution prohibits retrospective legislation, the basis of an assessment of taxes may as lawfully be retrospective as the reverse, that is to say, it may as well have regard to benefits theretofore received as to those which may be received thereafter. It has therefore been properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had previously been made, or to the assessment or reassessment of taxes upon property which has escaped taxation, or had been grossly undervalued for taxation in previous years."

[3] As we have said, the city might in the first place have assumed the burden of the public improvement, we think it competent, under authorities which are later cited herein, for the city to correct any errors or mistakes that may have been made in organizing the respective districts and imposing the burden of a public improvement upon such districts.

While it may be conceded that a street improvement is a benefit to abutting property, common knowledge teaches us that the general public is more advantaged by such improvement, and makes far more use thereof than does the owner of the abutting property.

Under the act of February 25, 1901, payment of the costs of the property might have been made by the city. This question is discussed, and what we have said as to the power of the city approved, in the case of the City of San Diego v. Potter, 153 Cal. 288, 95 P. 146.

[4, 5] The objection that the act under consideration is a violation of a contract or contracts, contrary to both the State and Federal Constitutions, is without merit. Under the authorities cited in Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972, the bonds issued creating a liability against respective districts does constitute a contract, but the act under consideration is not mandatory in any of its provisions so far as it relates to bondholders. The act is permissive only, so far as they are concerned. Bondholders are at liberty to accept provisions of the act and surrender their securities, or they can refuse to surrender the same and rely upon the provisions of the law in accordance with which the bonds were issued. This constitutes a complete answer to the contention that the act in question is violative of any contract sections of either the State or Federal Constitutions. Nor is the act violative of section 31 of article 4 of the State Constitution, which prohibits giving or lending of credit, or making any gift to any person, association, or corporation, whether municipal or otherwise.

The act under consideration, when carefully considered, is found to be only the assessment of a burden, as we have said, which the city might have assumed in the first instance, and is only, so far as the property owners are concerned, the relieving of them from an inequitable, and what has proven to be an unjust imposition. On the other hand, the course to be pursued by the city is designed to, and will restore to the city assessment rolls an almost unlimited number of lots which, by reason of being allowed to go delinquent on account of the excessive burdens imposed thereon by the city, no longer yields any tax revenue to the city, by reason of which the economic position of the city is greatly impaired. The record before us shows that already 35 per cent. of the taxable property of the city has been allowed to go delinquent, and no longer yields any revenue to the city, by reason of the city's not having assumed the burden of the public improvement in the first instance.

The difference between the act under consideration and the one condemned in the action entitled City of Redwood City v. Myers, 7 Cal.2d 283, 60 P.2d 291, 294, 108 A.L.R. 727, is readily apparent. The act under which the city of Redwood City was proceeding did not contemplate the relief of the distressed condition of the retiring of the bonds which imposed that condition, but was simply an investment proposition. Even in that case the Supreme Court used the following language: "We have recently held that where property within improvement districts has been sold for delinquent assessments and hopelessly withdrawn from the tax rolls of the county to such an extent as to seriously impair the county revenues, a statute which recognizes this serious condition in which the county is placed by the unusually large amount of such delinquent property, and authorized the expenditure of public money within reasonable limits for the purpose of assisting the distressed property owners and thus restoring this delinquent property to the tax rolls of the county as a legitimate use of public funds." Citing, County of Los Angeles v. Jones, 6 Cal.2d 695, 59 P.2d 489, and County of San Diego v. Hammond, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155.

Considering the same question the Supreme Court, in the case of City of Dunsmuir v. Porter, 7 Cal.2d 269, 60 P.2d 836, held that the fact that bondholders or others might receive some direct or indirect benefit would not prevent the city from carrying out the public purpose contemplated by the act of the Legislature authorizing cities to take action similar to that provided for in the act under which the city in this case is proceeding.

Practically every question tendered for our consideration has been passed upon in the case of the City of San Diego v. Hammond, supra. A like situation was there presented which is presented to the city in the instant case. There, property had gone delinquent, revenues of the county of San Diego were being so impaired as to render it problematical as to whether the county would be able to meet its current expenses, and enforce the various provisions of the law incumbent upon counties.

The Hammond Case, supra, appears to be supported by numerous cases involving like questions decided in other states, from one of which we will quote.

In Durrett v. Davidson, 122 Ky. 851, 93 S.W. 25, 29, 8 L.R.A.,N.S., 546, it appears that after turnpikes had been constructed under an act of the Legislature of that state imposing the burden of paying therefor upon certain districts, and the act proving unjustly burdensome and inequitable, the Legislature later on adopted a statute providing for a general tax by the county to pay the bonds issued for the benefit ot the turnpike taxing districts within the county. The court said: "We conclude, then, both upon reason and authority, that the power of fixing the burden of taxation to meet the indebtedness, arising from the construction of the turnpikes in Kenton county, being originally possessed by the Legislature, when it was afterwards ascertained that the first plan was unjust and inequitable, it was within the province of the lawmaking power to readjust this burden upon a new and more equitable plan, and therefore the act of 1906, which seeks to do this, is valid." The act under consideration in that case and the results from imposing a burden upon turnpike districts eventuated in just the condition which we find in the plaintiff city. The act of the Legislature in that case, just as here, was retroactive. See, also, Sacramento, etc., Drainage District v. Riley, 199 Cal. 668, 251 P. 207. Likewise, if chapter 494 of the Statutes of 1937 be considered as prospective legislation, contemplating new or additional benefits to the state at large, we find the Supreme Court has already upheld such legislation. Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A.L.R. 1515; American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622.

We may add again that a study of chapter 494, supra, and the Statutes of 1937, we think shows that the object of the act is not to make a donation either to the bondholders or to the property owners, but has for its purpose the restoring to the tax rolls of the city the property which is being caused to go off the tax rolls and become delinquent by reason of the excessive burdens theretofore cast upon the owners of such property. This benefit to the city is direct and primary, and therefore is not governed by any incidental considerations.

[6] There are a few cases, such as that of Stanley v. City of Great Falls, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166, and Oregon Short Line Ry. Co. v. Berg, 52 Idaho 499, 16 P.2d 373, which take a contrary view, but as pointed out by the petitioner herein the factual conditions in those cases are readily distinguishable from what is presented to us upon the record in this case. However, as the Supreme Court of California has taken a directly contrary position, it is incumbent upon us to follow the decisions of our own Supreme Court.

[7, 8] We find nothing in the act changing the method of taxation and the relieving of the assessment districts from bearing the entire burden of the cost of improvement which constitutes the taking of any property of the taxpayers within the city without due process of law. Nor does it constitute any burden of double taxation, as the district bonds are to be retired and the cost of improvement simply assumed by the city, and taxes to be levied therefor will be levied upon all the property within the exterior boundaries of the city.

Other authorities might be cited supporting the statements which we have herein made, but what we have said we think sufficiently shows not only that chapter 494, Statutes of 1937, is constitutional; that the proceedings taken by the city is for the accomplishment of a public purpose; that there is nothing in either the state or Federal Constitution inhibiting the proceedings being taken; that the public welfare of the city will be enhanced and its economic condition improved—

It follows necessarily that the writ prayed for should be granted. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

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25 Cal.App.2d 188

TRIPCEVICH et al. v. COMPTON et al.

Civ. 5895.

District Court of Appeal, Third District, California.

Feb. 25, 1938.

1. New trial ⟹163(1)

An order granting plaintiffs' motion for new trial on ground of insufficiency of evidence to sustain jury's verdict for plaintiff in unsatisfactory amount was not inadequate and uncertain as purporting to set aside verdict and judgment thereon in entirety and grant retrial on issue of damages only, where notice of intention to make motion clearly requested new trial solely on such issue. Code Civ.Proc. § 659.

2. Appeal and error ⟹302(1)

The appellate court must construe order granting motion for new trial within limits set up in motion on appeal from such order.

3. New trial ⟹137

The notice of plaintiffs' intention to move for new trial on sole issue of damages because of insufficiency of evidence to sustain jury's verdict for plaintiffs in amount deemed inadequate by them need not state that motion was made to vacate verdict and judgment thereon in whole or part, as vacation of verdict and judgment in fact is necessary consequence of granting new trial on issue of damages only. Code Civ.Proc. § 659.

4. New trial ⟹70

It is within trial court's discretion to grant new trial on ground of insufficiency of evidence to sustain jury's verdict.

5. New trial ⟹9

The granting of plaintiffs' motion for new trial on sole issue of damages because of insufficiency of evidence to sustain jury's verdict awarding plaintiffs only $600 damages for death of wife and grandmother, who had taken place of mother to one of plaintiffs, was not abuse of trial court's discretion. Code Civ.Proc. § 659.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Helen Tripcevich and others against Fred E. Compton and others to recover damages for the death of Angie Nicovich as the alleged result of named defendant's negligent operation of an automobile owned by a codefendant. From an order vacating and setting aside a verdict for plaintiff in an unsatisfactory amount and the judgment thereon, and granting plaintiffs a new trial, defendants appeal.

Affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellants.

Robert M. Holstein, of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Respondents herein are the husband and grandchildren of Angie Nicovich, who brought this action to recover damages for her death. The death was caused, as alleged in the complaint, by the negligent operation of an automobile owned by Evelyn Compton, and being then driven by Fred E. Compton. Upon the trial a jury returned a verdict in favor of plaintiffs for $600. Deeming the award inadequate, plaintiffs filed the following notice of intention to move for a new trial: "You and each of you will please hereby take notice that plaintiffs above named intend to and will move the above entitled court to vacate and set aside the verdict heretofore rendered in this action and the judgment entered thereon and to grant said plaintiffs a new trial herein on the sole issue of damages, on the following grounds * * *" specifying among others, that of insufficiency of the evidence to sustain or justify the verdict.

Thereafter, the court made the following order: "Good cause appearing therefor it is hereby ordered that plaintiffs' motion for a new trial in the above entitled action be and the same is hereby granted upon the ground of insufficiency of the evidence to justify or sustain the verdict."

In due time defendants moved for relief under section 473 of the Code of Civil Procedure upon the ground the order was inadvertently made. This motion was denied, and from the order vacating and setting aside the verdict and judgment, and from the order granting a new trial, this appeal is taken.

[1, 2] It is the contention of appellants that the order granting the new trial is inadequate and uncertain, in that it purports to set aside the verdict and the judgment in their entirety, and then attempts to grant a retrial as to the issue of damages only.

With this limited construction of the orders we cannot agree. The notice of intention, which under section 659 of the Code of Civil Procedure is also deemed to be the motion, clearly requests a new trial upon the sole issue of damages, and in construing the order we must do so within the limits set up in the motion; therefore, construing the two together, the intention of the court and counsel for respondents is plain.

[3] In Locke v. Moulton, 96 Cal. 21, 30 P. 957, 960, the court had before it the following notice of motion: "You will please take notice that the defendants, and each of them, intends to move the court to set aside and vacate the judgment rendered and entered herein, and to grant a new trial in this case."

In upholding the sufficiency thereof, it was said:

"In Bauder v. Tyrrel, 59 Cal. 99, it was held that it was not necessary for the notice of intention to move for a new trial to contain in terms a notice of intention to move that the decision should be vacated; that the order granting a new trial does of itself vacate the decision.

"This case was cited and followed in Heinlen v. Heilbron, 71 Cal. 557, 12 P. 673, in which the notice was, that defendants would 'make and submit to said court above named a motion for a new trial of said cause,' designating the grounds of the motion. If, therefore, as was held in Bauder v. Tyrrel [59 Cal. 99], it was not necessary that the notice in terms included the vacation of the decision, the notice in the case at bar is sufficient, and that part of the notice referring to the vacation of the judgment may be treated as surplusage; for if that part of the notice were stricken out, it would leave the notice precisely within the case of Heinlen v. Heilbron [71 Cal. 557, 12 P. 673]."

It would seem from the foregoing that it is not necessary that the notice should state that the motion was made to have the verdict and judgment vacated in whole or in part, for the vacation of the verdict and judgment in fact is a necessary consequence of granting a new trial as to the issue of damages only.

[4, 5] Appellants also contend the granting of a new trial was an abuse of discretion. They concede the verdict of $600 for the loss of a wife and grandmother, who had taken the place of mother to one of the plaintiffs, was inadequate, but interpret the award as indicating a compromise verdict and not a determination of either the issue of damages or liability, and cite in support of this contention Bencich v. Market Street Railway Co., Cal.App., 67 P.2d 398, and Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845.

Whichever of the foregoing cases may correctly state the rule in California, it is still within the discretion of the trial court to grant a new trial upon the ground of insufficiency of the evidence, and, here, after examining the entire record, we find no abuse of that discretion.

The order from which the appeal is taken is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

25 Cal.App.2d 205

SOUTHERN PACIFIC CO. v. FELDMAN et al.

Civ. 11698.

District Court of Appeal, Second District, Division 2, California.

March 1, 1938.

1. **Insurance** ⚷144(2)

A bond by surety in favor of six railroads in sum of $2,500, conditioned on payment by principal of charges for collect shipments delivered without first exacting charges thereon, could not be varied by letter written by insurance brokers to custodian of bond, requesting that it be allocated, $1,500 to one railroad and $500 to each of two railroads, in absence of evidence that brokers, on behalf of sureties, and custodian, on behalf of railroads, had authority to vary terms of bond.

2. **Insurance** ⚷144(1)

A bond by surety in favor of six railroads in sum of $2,500, conditioned on payment by principal of charges for collect shipments delivered without first exacting charges thereon, could not be varied, to show that bond covered only incoming freight received at Los Angeles, by letter written by custodian of bond to surety in answer to letters canceling bond, that custodian had a record only of a bond on incoming shipments, where letter did not refer to bond as being limited to incoming shipments to Los Angeles.

3. **Insurance** ⚷144(1)

A bond by surety in favor of six railroads in sum of $2,500, conditioned on payment by principal of charges for collect shipments delivered without first exacting charges thereon, could not be varied to show that bond covered only incoming freight received at Los Angeles, by letter written by general freight agent of railroad at Los Angeles, in answer to letters canceling bond, that they assumed that surety had reference to bond covering inbound shipments, but could not find bond in the files, where letter did not refer to bond as being limited to inbound shipments to Los Angeles.

Appeal from Superior Court, Los Angeles, County; Clarence L. Kincaid, Judge.

Action by the Southern Pacific Company against Lewis B. Feldman, doing business under the fictitious firm name and style Atlantic Fruit & Produce Company, and Lewis B. Feldman, individually, and the Commercial Standard Insurance Company, to recover charges on shipments made to Lewis B. Feldman, and on the Commercial Standard Insurance Company's bond conditioned on payment by Lewis B. Feldman of shipment charges. From an adverse judgment, the plaintiff appeals.

Judgment rendered for plaintiff against both defendants.

W. I. Gilbert, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

Lewis B. Feldman was doing a shipping business under the name of Atlantic Fruit & Produce Company, and it became necessary in his business to furnish a bond to guarantee the payment of freight to several of the railroad companies. He obtained from the Commercial Standard Insurance Company a bond in favor of six railroad companies, including the plaintiff, "as their respective interests may appear, in the sum of Twenty-five Hundred and no/100 dollars ($2,500.00) the maximum liability hereunder, lawful money of the United States, for the payment of which the said Principal, and the said Surety, bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. * * * Whereas, * * * it has been agreed that the said Railway Company, or Companies, will receive prepaid shipments from the Principal, and will deliver collect shipments to the Principal without first exacting payment of the charges thereon. Now, Therefore, the Condition of This Obligation is such that if the Principal shall * * * pay, or cause to be paid, to said Railway Company, or Companies, all of such charges then this obligation shall be void, otherwise it shall be and remain in full force and effect. * * *"

The bond was delivered to a joint custodian for the railroads with a letter from Levitt Maywood Company, insurance brokers, which read as follows: "We are inclosing herewith joint bond in amount of $2500.00 issued March 30th for Lewis B. Feldman, dba Atlantic Fruit & Produce Co., by the Commercial Standard Insurance Co. Please allocate this bond $1500.-00 to the Southern Pacific $500.00 to the Santa Fe, and $500.00 to the Union Pacific." Thereafter Feldman failed to make payments to plaintiff on eighteen shipments of perishable produce in the total sum of $2,176.55.

The first cause of action is against Feldman alone. It is alleged that Feldman delivered a carload of perishable produce to the plaintiff for transportation to Salt Lake City consigned to the said defendant; that the shipment was made and accepted there by the consignee; that through inadvertence and mistake plaintiff collected $10.38 less on the shipment than the Interstate Commerce Commission required it to collect. It therefore seeks judgment for the outstanding undercharge against Feldman.

The second cause of action alleges the same matters, declaring upon the same shipment, and in addition sets out that Feldman and the Commercial Standard Insurance Company gave the plaintiff the bond above referred to, guaranteeing the payment of said freight charges. Appropriate allegations set forth the fact that the bond was in force and effect at the time the charges sued for accrued; that demand was made on defendants for payment under the bond, but that payment had been refused. Recovery on the bond was sought against the insurance company as surety.

The other causes of action set forth in the complaint are similar. The first six shipments (causes of action 1 to 12) originated in Los Angeles. The remaining twelve shipments (causes of action 13 to 36) originated at various points in Imperial Valley. All shipments were consigned to Feldman at Salt Lake City, to which point they were transported, and where they were received by Feldman in due course. The last two causes of action are for demurrage charges amounting to $28, for which the parties agree on appeal judgment should have been rendered.

The answer of the insurance company sets up by way of affirmative defense (1) that the bond as written guarantees and was intended to guarantee only incoming freight received at Los Angeles, and that none of said shipments were received at Los Angeles, and (2) that at the time the bond was written its face amount was allocated as follows: $1,500 to the Southern Pacific Company, $500 to the Atchison, Topeka & Sante Fe Railway, and $500 to the Salt Lake Railway Company, and that in no event should the plaintiff be entitled to recover in excess of $1,500 under this allocation. At the trial the facts were agreed upon as above stated, except as to the affirmative defenses. As to them the bonding company offered in evidence two additional letters.

One of these letters was from the custodian of the bond and read as follows: "Commercial Standard Insurance Co., 1031 South Broadway, Los Angeles, Calif. Gentlemen: Your letter of Sept. 1st in re cancellation of Freight Bond your No. 25, filed by Leon Mayer, dated March 30, 1933: Your letter refers to the bond as being a guarantee bond covering perishable shipments. The only bond of which we have record is a joint freight bond executed by you on March 30, 1933, covering the 96-Hr period of credit on incoming shipments. Please advise if this is the bond you wish cancelled."

The second letter was from the general freight agent of the plaintiff at Los Angeles and said, "Regarding your letters of August 11th, in connection with cancellation of bond executed in favor of Atlantic Fruit & Produce Co. * * * 'While your letter states you wish to retire as surety under a bond guaranteeing payment of freight charges on shipments of perishable and damage account diversions, which would indicate the bond involved is one running to our line exclusively, nevertheless we are assuming that what you have reference to is a joint credit bond covering inbound shipments, as we do not locate a perishable bond involving your company in our files.'" There was no further evidence with regard to any one of the letters.

Under this state of the pleadings and the evidence the trial court held against Feldman for the full amount of $2,176.55. It found in effect that the six shipments which originated in Los Angeles and which were accepted by the defendant Feldman in Salt Lake City were outgoing shipments. It further found that the twelve shipments originating at various points in Imperial Valley and also consigned to Feldman at Salt Lake City were incoming shipments. It found in effect that the bond did not cover outgoing shipments, but did cover incoming shipments, and entered judgment for the undercharges on the twelve shipments originating in Imperial Valley for a total of $650.48. The judgment was for said sum against Feldman also, although it is obvious, and all parties concede, that judgment should have been for $2,176.55 against Feldman. No appearance was made by Feldman in the action.

[1] The trial court held in effect that the three letters above referred to became a part of the bond and varied its plain written terms. We are of the view that the evidence to sustain this finding is unsubstantial. As to the first letter which attempted to allocate the insurance, it attempted to allocate it to only three of the six railway companies. There is no evidence that the insurance brokers were authorized to vary the terms of the bond on behalf of the bond company, and there is no evidence that the custodian of the bond was authorized to vary the terms of the contract for the railroad companies or that he had any authority other than to be the custodian. There is no evidence that the plaintiff knew of the letter until after suit was brought.

[2, 3] As to the two other letters, the evidence is also unsubstantial. On their faces they were written, not for the purpose of modifying the contract, but in answer to letters from the plaintiff canceling the bond, and they only ask to identify the bond which is to be canceled. These letters do speak of a "joint freight bond on incoming shipments," but these letters were written after the liability on the bond had accrued. In any event, these letters do not refer to bonds on incoming shipments to Los Angeles, and might as well cover incoming shipments at Salt Lake City, and there is nothing in the bond or letters to limit it to incoming shipments at Los Angeles.

It is clear from what we have said above that the judgment should be rendered against both Feldman and the bond company for the full amount of $2,176.55 with interest. The trial court is directed to so render judgment.

We concur: WOOD, J., McCOMB, J.

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25 Cal.App.2d 235

In re MONGE'S ESTATE.

RINAUDO v. WAKEFIELD et al.

Civ. 1889.

District Court of Appeal, Fourth District, California.

March 3, 1938.

Executors and administrators ⟹194(6)

Where order requiring administrator to pay family allowance was not appealed from, though amount of allowance was reduced on application of creditor, and order discontinuing allowance was not appealed from, such orders were "final" and not subject to collateral attack on ground that estate was in fact insolvent, and hence guardian of defendants could recover accrued allowance up to date of discontinuance. Code Civ.Proc. § 1466, now Probate Code, § 680.

[Ed. Note.—For other definitions of "Final Order," see Words & Phrases.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of Costanzo Monge, deceased, wherein Terezina Rinaudo, guardian of the persons and estates of Frank Monge, Lucille Monge, Steve

Monge, Costanzo Monge, Jr., and Mary Monge. minors, petitioned for an order requiring C. K. Wakefield, as administrator of the estate of Costanzo Monge, sometimes known as C. Monge, deceased, to pay an accrued family allowance, opposed by the administrator and the Bank of America National Trust & Savings Association, as administrator of the estate of Lelio Pucci, sometimes known as Lilio Pucci, deceased. From an order denying the petition, petitioner appeals.

Reversed and order directed.

John D. Chinello and Rae B. Carter, both of Fresno, for appellant.

C. W. Tackaberry, of Reedley, and Paul Staniford, of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order denying appellant's petition for an order requiring the administrator of this estate to pay to her for the benefit of the above-named minors an accrued family allowance in the amount of $1,225.

Costanzo Monge died on September 7, 1924, and letters were issued in his estate on November 18, 1924. On February 13, 1925, an order was made granting to his widow a family allowance of $125 per month commencing September 7, 1924, and continuing until the further order of the court. The widow remarried, and on September 25, 1925, after due proceedings, an order was made granting to the appellant, as guardian of the minor children of the decedent, a family allowance of $150 per month commencing as of September 9, 1925, and continuing until further ordered by the court. On March 1, 1929, Bank of Italy National Trust & Savings Association, a creditor of said estate, filed a petition for a reduction or termination of said family allowance alleging that said estate was then insolvent. A hearing was held at which all interested parties appeared and on March 8, 1929, an order was made reducing the family allowance to be paid for the benefit of said minors to $100 per month and ordering that amount paid monthly in advance commencing with March 9, 1929. Payments were made in accordance with this order to and including December 9, 1932. Between that date and January 12, 1934, nothing was paid except the sum of $75, leaving an accrued family allowance as of the latter date of $1,225. On January 16, 1934, responsive to proceedings duly had, the court set aside to said minors a probate homestead and further ordered that said family allowance "be discontinued from and after the 12th day of January, 1934."

Thereafter, the appellant, as guardian of said minor children, filed a petition asking that the administrator be required to pay said accrued and unpaid family allowance. Answers were filed denying that the administrator had sufficient cash on hand to pay said sum or any sum to said minors, and alleging that the estate was and had been insolvent at all times during the course of administration. The court found that $4,771.86 was then in the hands of the administrator, that all expenses of administration had been paid except the sum of $300 as attorney's fees, that claims had been allowed aggregating about $27,000 which had not been paid, that from December 9, 1932, up to January 12, 1934, family allowance in the sum of $1,225 accrued in favor of said minors and had not been paid, and that on January 12, 1934, the court "did then terminate said family allowance." It was further found "that on the 9th day of December, 1932, the estate of said decedent was insolvent, and that said estate continued to be insolvent and is now insolvent." An order was made denying the petition, and this appeal followed.

The appellant contends that the court erred in admitting evidence with reference to the insolvency of the estate and in making its order denying the petition. It is argued that the finding that the estate was insolvent on December 9, 1932, constitutes a review by the trial court of a previous adjudication by the same court, that the question of insolvency was presented and passed upon by the court in making its order of March 8, 1929, that that order became final and had the effect of a money judgment, that said order was valid and in full force until regularly set aside, and that the order setting it aside could not be given a retroactive effect. The respondents contend that notwithstanding the wording of an order granting a family allowance under section 1466 of the Code of Civil Procedure, now section 680 of the Probate Code, there is an implied provision therein, arising out of said Code section, that any such payments shall continue for only one year from the granting of letters if the estate is insolvent, that if at any time after the making of an order for family allowance the estate becomes insolvent the court is without power to enforce the payment of any family allowance which accumulates after said year, and that the question of insolvency of the estate may be brought to the court's attention at any time and does not constitute a collateral attack upon any orders theretofore made with respect to the payment of a family allowance.

The respondents rely upon Estate of Montgomery, 60 Cal. 648, and Estate of Treat, 162 Cal. 250, 121 P. 1003, 1005. In Estate of Montgomery, upon the application of creditors, a family allowance was discontinued and no attempt was made to make the order of discontinuance retroactive. In Estate of Treat, the court held that a determination of the question of solvency or insolvency was not necessarily involved in making an order for family allowance within a year after the granting of letters and that a finding or adjudication on that point is not to be implied in the absence of express terms showing such an intention. The right of creditors to oppose the payment of a family allowance for more than one year, in such a case, by showing that the estate was insolvent was sustained on the grounds and for the reasons that the question of solvency had not been passed upon, that the provision of the Code section was to be considered a part of the order as made, and that the cutting off of the allowance at the end of a year was not a change of the original order but was the carrying out of a limitation contained therein. But the court recognized the distinction between the case then before it and one where the question of solvency had been determined by the order for a family allowance, and in commenting on the case of Estate of Bell, 131 Cal. 1, 63 P. 81, 82, 668, said: "On the settlement of an executor's account, objections were made to items consisting of sums of money paid by the executor to the widow under orders of the court for family allowance made years after the granting of letters, and after the widow had been paid a large allowance for years under a prior order. The ground of objection was that the estate was insolvent when such subsequent orders were made. It seems to be implied in the opinion that, if such could be shown to be the case, the court must be held to be without jurisdiction to make the order, doubtless because the allowance granted thereby was for a period during which no allowance could be made, in view of the limitation contained in section 1466, Code of Civil Procedure. But it was very properly held that under such circumstances, solvency of the estate being a prerequisite to the making of any order at all, the making of the order was necessarily a finding and adjudication that the estate was then solvent, which, of course, could not be attacked collaterally. The distinction between that case and this is obvious."

In Estate of Bell, supra, an order for the payment of a family allowance was made prior to the return of the inventory. About three years later, on the petition of creditors, the amount allowed was reduced. About three years later the amount was again reduced. Upon the hearing of the final account the creditors objected to the amounts paid under the two later orders for family allowance on the ground that these orders were void by reason of the fact that the estate was insolvent when they were made. In holding that a valid order for a family allowance could not be thus attacked, the court said:

"The order is not void upon its face, and it is too late upon the hearing of the account to show that the estate was insolvent when the order was made, and that therefore the court lacked jurisdiction to make it. Such a holding would place executors and administrators in a sorry plight, as would be fully exemplified in this case if these items for money paid were rejected from the account. Conceding the court had no power to make the order if the estate was insolvent, still the making of the order in itself is an adjudication that the estate was not insolvent. * * *

"The time for appeal from the order has long gone by, and the attack here made is essentially a collateral attack. The making of the order necessarily involved a determination that the estate was solvent, and it is now proposed to show upon this collateral attack that the finding of the court as to the solvency of the estate is untrue. This cannot be done. These appellants had ample opportunity to protect themselves, if the estate was insolvent, by directly attacking the order. If they had no notice of the hearing upon which the order was made, then, clearly, they had the right subsequently to ask the court to set it aside."

The court then pointed out that the presumption which applies to judgments applies to such an order.

In Estate of Nelson, 167 Cal. 321, 139 P. 692, 693, letters were issued in June, 1909. In accordance with an order made a family allowance was paid up to September 5, 1910. On September 8, 1910, under a decree of partial distribution the widow received some $146,000. No further payments were made under the order for family allowance and on June 7, 1913, the widow applied for an order directing the executors to pay to her the family allowance which had accrued since September 5, 1910. The executors moved for an order discontinuing the family allowance from and after September 5, 1910. The two motions came on for hearing together, the court ordered the payment of the accrued allowance up to the date when notice of the motion to discontinue was served, and the executors appealed. In affirming the order the court said: "When such order has become final, either by affirmance on appeal or, as in this case, by lapse of the time within which an appeal might have been taken, it becomes a binding and conclusive adjudication of all matters necessarily determined by the trial court as a basis to the making of the order. * * * The order is not subject to collateral attack, and the superior court does not retain power to review its own action and make a new exercise of the judicial discretion on the matter, which it has already determined by such adjudication."

In that case the court further said: "We do not doubt that, where there has been a change in the circumstances of the estate, or in the relations of the parties, the court may modify the order in accordance with the altered conditions. That such power exists has been strongly intimated, though not directly decided, by this court in Estate of Lux, 100 Cal. 593, 604, 35 P. 341, and Estate of Bell, 131 Cal. 1, 63 P. 81, 668. See, also, Estate of Walkerley, 77 Cal. 642, 20 P. 150. But, until such modification is made, the order retains its force as a judgment. So far as the claim for installments of allowance had actually accrued, 'the order, like any money judgment, was the property of the respondent.' Estate of Lux, 114 Cal. 73, 45 P. 1023. Assuming, therefore, that the executors proved that there had been such a change as to justify a reduction of the family allowance, they were not entitled to claim, as they do on this appeal, that the court should have made such reduction operative retroactively, so as to cut off the allowance accrued since the partial distribution."

In Estate of Houston, 205 Cal. 276, 270 P. 939, 60 A.L.R. 730, where a creditor was trying to collect a judgment against an estate which, though originally solvent, had become insolvent, the court held that since the estate was solvent when the order was made the duration of the allowance was not limited to one year, that a creditor was in no position to attack an order granting a family allowance which had become final, that the creditor might have acted opportunely to secure a modification of the order, but that any such modification could not operate retroactively.

Under the rules thus laid down, we conclude that the court erred in receiving evidence upon the question of the insolvency of this estate, in finding that the estate had been insolvent since December 9, 1932, and in denying the petition. The order made on March 8, 1929, was necessarily based upon a finding that the estate was then solvent, and that order became final and remained in full force and effect until it was terminated by the order discontinuing the family allowance from and after January 12, 1934. That order in turn became final and could not be reviewed or set aside by the same court. The order for a family allowance was in full force and effect until it was regularly set aside as of January 12, 1934, and the appellant was entitled to the amount which had accrued and which was unpaid up to that date. It is conceded that this amount is $1,225.

The order appealed from is reversed and the trial court is directed to enter an order for the payment by the administrator of this estate to the appellant, as such guardian, of the sum of $1,225.

We concur: MARKS, J.; JENNINGS, J.

25 Cal.App.2d 209

CARPENTER, Insurance Commissioner, v. COAST SURETY CORPORATION et al.

Civ. 11658.

District Court of Appeal, Second District, Division 2, California.

March 1, 1938.

1. Insurance ⟹4

A statute giving judicial surety bond the status of an unliquidated claim in proceeding for liquidation of an insurance company is within the power of the Legislature. St.1935, p. 543, § 1025.

2. Insurance ⟹51

Under statutes governing liquidation of insurance companies, providing generally that all rights shall be fixed as of date of order of liquidation, providing specially for filing of unliquidated claims accruing within time for filing of claims, and giving judicial surety bond the status of an unliquidated claim, county was entitled to allowance of claim on bail bond of insurance company in liquidation, where bond was forfeited and judgment thereon was entered during period allowed for filing of claims. Code Civ.Proc. § 1859; St.1935, pp. 542, 543, §§ 1019, 1021, 1025–1027.

3. Insurance ⟹51

Under statute making particular statutory provision paramount to inconsistent general provision, statute providing for filing, in proceedings for liquidation of insurance companies, of unliquidated claims accruing within time for filing of claims, and giving judicial surety bond the status of an unliquidated claim, would prevail over statute providing generally that in such proceedings all rights shall be fixed as of date of order of liquidation. Code Civ.Proc. § 1859; St.1935, pp. 542, 543, §§ 1019, 1025.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Samuel L. Carpenter, Jr., as State Insurance Commissioner, for the liquidation of the Coast Surety Corporation, wherein a claim was filed on a bail bond by the County of Alameda. From an order affirming the denial of its claim by the commissioner, claimant appeals.

Reversed.

Earl Warren, Dist. Atty. of Alameda County, Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley and Lynn J. Gillard, Deputy Dist. Attys., all of Oakland, for appellant.

Frank L. Guerena, of San Francisco, and Eugene P. Fay, of Los Angeles, for respondent.

WOOD, Justice.

The claimant, the county of Alameda, appeals from an order of the superior court affirming the action of the Insurance Commissioner in denying its claim against Coast Surety Corporation. An order was made by the superior court on February 13, 1936, by which it was ordered that the business of the Coast Surety Corporation be liquidated by and under the direction of Samuel L. Carpenter, Jr., as Insurance Commissioner of the state of California. It was further ordered that those having claims against the corporation present the same to the liquidator on or before six months after the date of the publication of notice to creditors. On February 13, 1936, the county of Alameda was obligee upon a bail bond given by Coast Surety Corporation. This bond was forfeited on March 9, 1936, and on July 31, 1936, judgment was entered on the bond in favor of the county. Thereafter, and within six months from February 13, 1936, the county filed its claim with the liquidator. The claim was rejected by the liquidator and an order to show cause was issued by the superior court, resulting in the ruling from which the appeal is taken.

Section 1019 of the Insurance Code, St. 1935, p. 542, provides: "Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made."

Section 1021 provides for the giving of notice to creditors. Section 1025 provides:

"Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section 1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

"An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation or accrues within the time limit provided in this article for the filing of claims, and upon which the liability has not been determined or the amount thereof liquidated; provided, however, that claims founded upon judicial surety bonds and undertakings securing unmatured obligations shall be deemed to be unliquidated and undetermined demands within the meaning of this section."

[1, 2] It may be conceded that if section 1019 stood alone the claim in question could not be allowed, since it provides that the rights of creditors "shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order" of liquidation. But the Legislature has seen fit to enact section 1025, in which provision is made for unliquidated claims. It is there provided that an unliquidated claim shall be deemed to be a claim upon which a right of action has accrued "or accrues within the time limit provided in this article for the filing of claims, and upon which the liability has not been determined." There is a further provision in the section, "that claims founded upon judicial surety bonds and undertakings securing unmatured obligations shall be deemed to be unliquidated and undetermined demands within the meaning of this section." The claim of the county of Alameda comes within the terms of this provision. The surety bond held by the county constituted an obligation on the part of the corporation which was unmatured. It was within the power of the Legislature to especially provide that judicial surety bonds shall be given the status of unliquidated claims, and this it has done by unambiguous language. The unmatured obligation has matured within the time limit provided for the filing of claims.

[3] The general rule on the subject of claims is to be found in section 1019 but doubtless the Legislature intended the provision contained in section 1025 to be a modification of the general rule. The specific exception must prevail over the general provision. In section 1859 of the Code of Civil Procedure it is provided that, "when a general and a particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." The claimant's contention that the Legislature intended a deviation from the general rule by the provision in question finds added force in sections 1026 and 1027, wherein it is provided that unliquidated third party liability claims against an insured may be filed against the insurer after the latter is adjudged insolvent without requiring such a claim to be reduced to a judgment.

The order is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

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25 Cal.App.2d 212

BACK v. FARNSWORTH et al.

Civ. 6000.

District Court of Appeal, Third District, California.

March 1, 1938.

Hearing Denied by Supreme Court April 28, 1938.

1. Trusts ⇨44(1)

Evidence warranted finding that woman, who negotiated sale of her separate house and lot to plaintiff and to whom plaintiff executed a quitclaim deed when he was unable to continue making the payments, held house and lot in trust for plaintiff.

2. Appeal and error ⇨1010(1)

To justify an appellate court in determining that there was no substantial evidence because of inherent improbability to warrant the conclusion of the trial court, there must exist, either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story.

3. Husband and wife ⇨133(1)

Evidence warranted finding that husband had no interest in house and lot which wife held in trust for plaintiff at the time of wife's death.

4. Husband and wife ⇨131(3)

All property conveyed after May 18, 1889, by a written instrument to a married woman in her name only, is presumed to be her separate property. Civ.Code, § 164.

5. Stipulations ⚷7

A colloquy, wherein plaintiff's attorney asked adverse counsel if counsel would stipulate that house and lot in question were community property, did not constitute a definite stipulation which was binding on the court's finding as to whether house and lot were community property, where counsel failed to assent affirmatively to the inquiry as a fact.

6. Stipulations ⚷13

While a stipulation with respect to a valid issue may be treated by the court as evidence upon which a finding may be adequately supported, a stipulation, which is clearly inadvertently made in conflict with a party's theory of his case and opposed to his absolute rights, may be disregarded when there is substantial proof to the contrary.

7. Stipulations ⚷13

Conclusive evidence that house and lot which wife held in trust for plaintiff at time of wife's death were separate property of wife warranted finding that house and lot were wife's separate property, notwithstanding that plaintiff's attorney unwittingly asked adverse counsel if counsel would stipulate that house and lot were community property, where purported stipulation conflicted with plaintiff's theory of case and was opposed to plaintiff's rights.

8. Appeal and error ⚷1010(1)

A finding adequately supported by evidence will not be disturbed.

9. Appeal and error ⚷1058(1)

The refusal to admit proffered evidence, if error, was harmless where evidence was merely cumulative.

10. Executors and administrators ⚷431(2)

A plaintiff seeking recovery of realty and rents therefrom alleged to have been held by deceased persons in trust for plaintiff need not file a claim against estates of deceased persons as a prerequisite to maintaining an action against administrators of estates. Probate Code, § 716.

11. Executors and administrators ⚷431(2)

A suit to recover specific identified property alleged to have been held in trust by deceased person for plaintiff involves property not belonging to deceased person's estate rather than an indebtedness of the estate, and hence the presenting of a claim against the estate is not a prerequisite to maintenance of suit, notwithstanding that the complaint seeks a judgment in the alternative for the property or its value. Probate Code, § 716.

12. Appeal and error ⚷909(4)

In suit to recover rents collected by deceased persons from realty alleged to have been held in trust by deceased persons for plaintiff, District Court of Appeal would assume, in support of judgment awarding certain sums to plaintiff for rents collected by deceased persons, that such sums could be adequately traced and identified.

◆

Appeal from Superior Court, Los Angeles County; Carl B. Stutsman, Judge.

Suit by Andrew Back, sometimes known as Andrew Bak, against T. S. Farnsworth, administrator with the will annexed of the estate of Mary Reiber, deceased, and Ben H. Brown, as administrator of the estate of Philip Reiber, deceased, to recover specific property alleged to have been held by the deceased persons in trust for the plaintiff. From the judgment, the defendants appeal.

Affirmed.

Martin Forrest, Arthur W. Kennedy, and Marshall Stimson, all of Los Angeles, George R. Robbins, of Bell, and Noel Edwards, of Los Angeles, for appellants.

Saul S. Klein and Emanuel & Klein, all of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Upon appropriate pleadings the trial court decreed that the appellants held a Los Angeles lot and dwelling house together with a sum of money collected as rental therefrom in trust for the respondent. It was held the facts involved established a resulting trust in favor of the respondent. From that decree this appeal was perfected.

It is contended the findings and judgment are not supported by the evidence for the reason that the facts related by the respondent's witnesses are inherently improbable; that the original trustee of the property held only a community interest with her husband in the house and lot; and that she therefore could not lawfully devise by her will his portion of the property, and that the money judgment for accumulated rental was erroneously rendered for the reason that no claim therefor was previously presented to the estate of either Mr. or Mrs. Reiber, deceased.

Mary and Philip Reiber were husband and wife. The respondent, who was then a married man, was their very close friend. They all resided in Los Angeles and they belonged to the same nationality. Neither of them was acquainted with legal proceedings or the formal requirements of transferring title to real property. The respondent was not well educated and expressed himself in English with great difficulty. Mrs. Reiber was about eighty years of age and moved about with difficulty. The respondent was a frequent visitor in the Reiber household and performed many courtesies for the benefit and welfare of Mrs. Reiber, who held him in high esteem. January 30, 1905, lot 187 of the Ford tract of the city of Los Angeles, together with the dwelling house situated thereon, was, for a valuable consideration, deeded by Laura and David M. Young, husband and wife, to Mary Reiber. It was worth about $5,000. December 1, 1921, Mrs. Reiber agreed to sell the house and lot to the respondent for $4,200. He then paid her the sum of $2,000 on the purchase price thereof. A written agreement of sale of the property was executed and delivered to the respondent on the last-mentioned date. Philip Reiber also signed that contract with his wife. The contract specified as consideration for the sale the sum of $2,276.93, which was the unpaid portion of the purchase price of the property, plus some expenses incident to the transaction. This balance was to be paid in equal installments of $30 on the first of each and every month, together with 7 per cent. interest per annum on all deferred payments, until the entire amount was fully satisfied. The purchaser agreed to pay all assessments and taxes levied against the property and to keep it in good repair. The respondent took and remained in possession of the property for about ten years, but was very slow in making his payments thereon. During that time, however, he paid all taxes and assessments, together with the sum of $1,268.41 on the unpaid principal and also interest in the aggregate sum of $681.94. By March 14, 1931, he had reduced the unpaid purchase price of the property to $1,031.54. In the meantime he remained on the best of terms with Mr. and Mrs. Reiber, who apparently never complained of his failure to meet the deferred payments. The respondent was embarrassed by that and other indebtedness. Mrs. Reiber agreed to take and hold title to the property in trust for the respondent and apply the rental thereof to the payment of the deferred installments on the purchase price of the property. In that regard, Mr. Back testified that on March 14, 1931: "I went out there and told them I couldn't make a payment,—I told them I can't make a payment on the house, and Mrs. Reiber and Mr. Reiber both was there, and they both was telling me 'Don't worry about the house.' Mrs. Reiber says 'I can take the house over, and collect the rent, and that will be paid on the payments on the house.' She says she don't want the house. She says that she was going to hold the house for me, but she says that she don't want my house. She says that she want to collect the rent, and that the rent would be paid on the house, and for me to give her a quitclaim deed, so nobody else could put some kind of a claim on it, and she was telling me that she would like to have me give her a quitclaim deed for it, and she would like to have it all in her name, and she would hold the house for me."

Pursuant to the foregoing understanding, the respondent executed and delivered to Mrs. Reiber a quitclaim deed to the premises. Later he moved to another residence. Thereafter the respondent paid taxes on the property amounting to $97.42, and street assessments on the property in the sum of $53.92. He also made repairs on the house and insured the buildings in his own name. Mr. Joseph Herrick testified to a conversation, in which he participated, between Mr. and Mrs. Reiber and the respondent early in 1932. He said that both Mr. and Mrs. Reiber confirmed the fact that Mrs. Reiber was holding the property in trust for the respondent, and that she was applying the rent which was collected therefrom to the payment of deferred installments on the contract of purchase. The property was actually rented during much of the time after the respondent surrendered possession of it. In March, 1932, Mary Reiber executed her will, bequeathing to the respondent whatever sum remained unpaid on his contract to purchase the house and lot. That provision of the will reads: "Item (K) To my friend Andrew Bak, of 544 E. 53rd Str. Los Angeles, Calif., whatever amount, if any, may be due on a house and lot which he purchased from me."

This provision of the will confirms the theory that Mrs. Reiber was holding the property in trust for the respondent. The will was made about a year after the testatrix took the quitclaim deed from the respondent. At the time the deed was executed, he owed her about $1,031. It is evident Mrs. Reiber assumed the purchase price might be fully paid by applying the rental which she was collecting before her death occurred, in which event the above-quoted clause of the will would become inoperative, and the bequest would lapse.

In the summer of 1933, Mrs. Reiber told the respondent she considered that his contract to purchase the property was fulfilled; that the purchase price had been fully paid; and that she was ready to give to him "the deed and all the papers" to convey to him clear title. Accordingly she went with the respondent to her safe-deposit box in the Security-First National Bank of Los Angeles and delivered to him her original deed from Mr. and Mrs. Young, a certificate of title to the property issued by the Title Insurance & Trust Company, an insurance policy for $4,000 on the dwelling house in favor of Andrew Back, with a rider attached thereto, naming Mrs. Reiber as mortgagee of the premises, and entitling her to payment in case of fire as her interest might appear. Mrs. Reiber also returned to the respondent the original contract of sale of the property. She then told him that any time he would present to her a deed to the property she would execute it. He, however, failed to procure the making of the deed, and Mrs. Reiber died within five months thereafter.

There is no question regarding the actual delivery of those instruments to the respondent. Five disinterested witnesses testified that Mary Reiber thereafter stated in their presence that she had "deeded the property back" to the respondent, and that she had given him all the papers with relation thereto. It is of little importance that the respondent said he thought the papers were taken from the safe-deposit box and given to him in July or August, 1933, and that the bank records show the last time Mary Reiber had access to that box was May 27, 1933. The witness said he was uncertain of the exact date. He thought it was in July or August. Two years had elapsed since that event. It is not strange that the transaction may have occurred a month earlier than he thought it did. There is no question that she gave him the documents at some time for they were in his possession.

Mrs. Reiber died October 7, 1933. Upon proceedings duly had her will was admitted to probate and the defendant T. S. Farnsworth was appointed and qualified as administrator with the will annexed of her estate. The house and lot were included in the inventory as the property of her estate. Soon thereafter the respondent demanded a deed to the property. Mr. Reiber assured him that the property belonged to him, but said that the attorney would not then agree to a conveyance. In April, 1935, Philip Reiber died intestate and the defendant Ben H. Brown was appointed administrator of his estate. A demand for conveyance of the property was made and refused.

This suit was promptly commenced in June, 1935, against the representatives of the estates of both Mary and Philip Reiber, to declare a resulting trust in the house and lot and in the money collected as rent from the property after the death of Mrs. Reiber for the benefit of the respondent. The administrator of each estate separately answered the complaint, denying the material allegations thereof. It was also affirmatively alleged the claim to title of the land and money was waived by failure to previously present to the estates verified claims therefor as provided by section 707 of the Probate Code. Upon trial of the cause the court adopted findings favorable to the respondent upon every essential issue. A judgment was accordingly rendered in which it was held that the house and lot in question is the property of the respondent free from all encumbrance; that it is held in trust for him by the representatives of the estates of Mary and Philip Reiber, and that respondent recover from the estate of Mary Reiber the sum of $469.35, in due course of administration, being the rent collected from his property and retained after the death of Mrs. Reiber, and the further sum of $62.70 from the estate of Philip Reiber, being rent collected from the property and retained by Mr. Reiber prior to his death. From that judgment this appeal was perfected.

[1, 2] After a careful reading of the transcript on appeal, we are satisfied every essential finding of the court necessary to uphold the judgment is adequately supported by the evidence, and that the evidence of a resulting trust in favor of the respondent is not inherently improbable. In-

deed, in view of the circumstances of the case, including the lack of knowledge of legal proceedings necessary to the conveyance on the part of the respective parties and considering the friendly relations existing between them, together with the age of Mrs. Reiber, it is reasonable to believe that she held the property in trust for the respondent. It is unreasonable to assume that the respondent would voluntarily give up title to property which cost him $4,200, upon which he had paid the entire purchase price except for the sum of about $1,000, and that he would thereafter make repairs on the building, insure the premises and pay taxes and street assessments, if he claimed no interest therein. The findings in that regard are in accordance with the evidence and with sound reason.

With respect to rejecting evidence on the ground that it is inherently improbable, it is said in Powell v. Powell, 40 Cal.App. 155, 158, 180 P. 346, 348: "To warrant it in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story."

No such condition exists in the present case as is suggested in the preceding quotation. We are of the opinion the evidence should not be rejected on the ground that it is inherently improbable.

[3] The finding to the effect that Mary Reiber was the sole owner of the house and lot in question prior to the time when the respondent's purchase price therefor was fully paid to her, and that her husband, Philip Reiber, had no interest therein, is adequately supported by the evidence. It is uncontradicted this property was deeded to her by Mr. and Mrs. Young, January 30, 1905. That deed was recorded at the request of the grantee. In her negotiations with the respondent for the sale of the property Mrs. Reiber treated it as her own separate property. It was assessed in her own name. When she executed her will she bequeathed to the respondent whatever might then remain unpaid on "a house and lot which he purchased *from me.*" After the contract of purchase was executed the dwelling house was insured. In that policy Mrs. Reiber only was named as the "mortgagee." There is no evidence that Philip Reiber ever owned an interest in the property.

[4] All property conveyed after May 18, 1889, by a written instrument to a married woman in her name only is presumed to be her separate property. Section 164, Civ. Code; Thompson v. Davis, 172 Cal. 491, 157 P. 595; 5 Cal.Jur. 317, § 23.

[5] The record contains a colloquy which occurred between respective counsel during the trial with respect to the question as to whether the house and lot were the community property of Mr. and Mrs. Reiber. We are of the opinion it does not constitute a definite stipulation which is binding upon the court's finding in that regard. It is true that Mr. Saul Klein, attorney for the respondent, did unwittingly ask adverse counsel if he would stipulate that an undivided one-half interest in the property belonged to Philip Reiber. Mr. Edwards, attorney for appellant, replied that it was community property, but attached a condition to his answer. The question raised by that condition was not settled in the controversy. In spite of the fact that Mr. Klein asked adverse counsel if he would so stipulate, he failed to affirmatively assent to that inquiry as a fact. Fairly construed, we are of the opinion the controversy did not amount to a definite stipulation.

[6-8] It is true that a stipulation of respective counsel with respect to a valid issue in a case may be treated by the court as evidence upon which a finding may be adequately supported. 2 Jones Com. on Evidence, 2d Ed., p. 1759, §§ 955, 956. But when the stipulation is clearly inadvertently made in conflict with a party's theory of his case and opposed to his absolute rights, the stipulation may be disregarded when there is substantial proof to the contrary. In the present case evidence was adduced almost conclusive of the fact that Mary Reiber owned the property separately from her husband. The court had a right to adopt a finding to that effect, which it did. That finding is adequately supported by the evidence and we are of the opinion it may not be disturbed on appeal.

[9] The appellants were not prejudiced by the rejecting of proffered evidence at the trial. The evidence to which objections were sustained was merely cumulative. The rulings of the court in that regard were therefore harmless.

[10, 11] It was not necessary for the respondent to first file a claim against the

estate of Mary or Philip Reiber, deceased, as a prerequisite to maintaining this action to establish a resulting trust in the real property or rental therefrom which was collected by them. This is a suit to recover specific property alleged to have been held by the deceased persons in trust for the respondent. Where the recovery of specific property is sought on the ground that it is impressed with a trust for the benefit of the person claiming it, and the particular property is identified the issue does not involve an indebtedness of the estate, but, on the contrary, it is an asserted demand for delivery of property which does not belong to the estate, and the presenting of a claim is, under the provisions of section 716 of the Probate Code, therefore, not a prerequisite to the maintenance of the suit. This is true even though the complaint seeks a judgment in the alternative for the property or its value. Estate of Dutard, 147 Cal. 253, 81 P. 519; Swanson v. Siem, 124 Cal.App. 519, 526, 12 P.2d 1053; Holland v. Bank of Italy Nat. T. & S. Ass'n, 115 Cal.App. 472, 480, 1 P.2d 1031, 1035; 11a Cal.Jur. 710, §§ 504, 505; 3 Bancroft's Prob. Prac. 1387, § 777. With respect to a suit to establish a trust in specific funds, it is said in the Holland Case, supra: "Unless it can be said that the complaint here shows on its face that the identical trust property, or its product in a new form, cannot be traced by the plaintiffs, the contention of the respondents must fail. When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust."

[12] In the present case the complaint clearly alleges a resulting trust in favor of the respondent to both the real property and the rental collected therefrom by both decedents. It also asks for an accounting to determine the exact amount of rental due from each of them. The identity of the real property is conclusively established. No claim for the real property was required to be filed. With respect to the money collected by each decedent from the real property, we are pointed to no evidence indicating that the exact sums for which judgment was rendered for rental against the representatives of those estates may not be adequately traced and identified. In support of the judgment for such sums, we must therefore assume that those funds were also sufficiently identified.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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25 Cal.App.2d 360

PEOPLE v. BROWN.

Cr. 360.

District Court of Appeal, Fourth District, California.

March 15, 1938.

Criminal law 🔑**1182**

Where clerk's transcript and reporter's transcript had been filed and cause was placed on calendar for argument, but no one appeared for defendant and no briefs had been filed for him, conviction was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Sheldon W. Brown was convicted of an offense, and he appeals.

Affirmed.

Charles M. Astle, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Henry A. Hunter, Deputy Dist. Atty., of Fresno, for the People.

MARKS, Justice.

When this cause was called for argument, the Attorney General moved to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's transcript was filed on December 31, 1937, and the reporter's transcript on January 26, 1938. The cause was placed on the March 8, 1938, calendar for argument. No one appeared for defendant and no briefs have been filed for him.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

25 Cal.App.2d 305

LENT et ux. v. H. C. MORRIS CO. et al.

Civ. 10730.

District Court of Appeal, First District, Division 2, California.

March 11, 1938.

Rehearing Denied April 9, 1938.

Hearing Denied by Supreme Court May 9, 1938.

1. Partition 🔑**114(1)**

Compensation claimed by a receiver appointed ex parte in partition action would not constitute a charge against the unsuccessful defendant, but only against the person who wrongfully procured the appointment if the appointment was without the jurisdiction of the court. Code Civ.Proc. § 564, as amended by St.1933, p. 1867, § 85a.

2. Partition 🔑53

A superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of realty between tenants in common. Code Civ.Proc. § 564, as amended by St.1933, p. 1867, § 85a.

3. Partition 🔑65

The superior court in which a partition action was commenced would determine all the issues in order to do complete justice, since the main action was in equity in which the superior court had jurisdiction to hear and determine.

4. Partition 🔑53

The appointment of a receiver in a partition action may be made ex parte and without notice if imperative necessity or emergency is shown in the petition or supporting affidavit. Code Civ.Proc. § 566.

5. Appeal and error 🔑863

On appeal from ex parte order appointing receiver in partition action, question before reviewing court was not one of jurisdiction, but of error, and as such is limited to inquiry whether trial court abused its discretion. Code Civ.Proc. § 564, as amended by St.1933, p. 1867, § 85a; § 566.

6. Appeal and error 🔑946

An appellate court is never justified in substituting its discretion for that of a court sitting nisi prius, but its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½.

7. Appeal and error 🔑948
Partition 🔑53

An order appointing a receiver ex parte in a partition action was not an abuse of discretion where it was not contended that receiver should not have been appointed, and, within seven days after appointment, defendant moved to vacate order and was given full hearing thereon, want of jurisdiction was not shown, and record disclosed that defendant was benefited materially by appointment and acquiesced therein by unreasonable delay of ten months in bringing appeal to issue. Code Civ.Proc. § 564, as amended by St.1933, p. 1867, § 85a; § 566; Const. art. 6, § 4½.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Partition action by Al. H. Lent and wife against the H. C. Morris Company and others. From an ex parte order appointing a receiver, the named defendant appeals.

Affirmed.

Dunn, White & Aiken, Carlos G. White, and B. R. Aiken, all of Oakland, for appellant.

Woolsey & Huovinen, of Oakland, for respondents.

NOURSE, Presiding Justice.

This is an appeal by defendant H. C. Morris Company from an ex parte order appointing a receiver.

Plaintiffs and defendant, as tenants in common, owned the Federal Realty building in Oakland, valued at about $400,000, and bringing in an income from rentals of about $2,000 per month. Plaintiffs' half interest in the building was encumbered with a $55,000 trust deed. Morris Company had the control and management of the building. Plaintiffs sued for partition on a complaint filed January 20, 1936. The ex parte application for appointment of a receiver was granted the same day, and the order appointing the receiver was filed the following day. Seven days later Morris Company moved to vacate, set aside, and revoke the order of appointment and, upon denial of this motion after a full hearing, it appealed from the order of appointment.

Appellant's points are argued under 12 main headings, attacking the propriety of the ex parte receivership, the jurisdiction of the court, and the sufficiency of the showing upon which the order was made. Respondents urge that the appointment was a proper exercise of discretion by the court below. Respondents further urge that this appeal must now be decided against appellant because of its failure to show injury from the receivership. In connection with this latter contention, the following further facts, disclosed on the motion to dismiss the appeal herein, should be noted:

The main action for partition was tried in June, 1936. Pursuant to stipulation of the parties there was entered on February 11, 1937, an interlocutory decree and order declaring the respective rights in the property, that partition could not be made without great prejudice to the owners, and therefore ordering the property sold at public auction, and appointing a referee to conduct the sale. No appeal was taken from this decree, and it has become final for all purposes. Pursuant thereto the referee auctioned the property. It was purchased by the Morris Company, the sale being confirmed on March 29, 1937, upon an increased bid of $150,000. The order confirming the sale specified, among other things, the termination of the duties of the receiver. The receiver's duties were terminated as of April 1, 1937. He had managed the property for some fifteen months, paid all maintenance charges, paid about $3,500 in taxes, and had a balance on hand of $8,300, having made no repairs and having done no reconditioning work.

Respondents urge that any questions as to the propriety of the appointment of the receiver have become moot and abstract by reason of the settlement of all issues as aforesaid; further that the fact that appellant for a period of ten months withheld from filing the bill of exceptions used in this appeal and during all of that time permitted the receiver to carry out his duties without objection, and the record of the receiver while in control of the property would indicate not only that the receiver was greatly needed, but that he made a good job of it.

[1] Appellant replies that the questions presented by this appeal are not moot by reason of the conclusion of the main controversy; that the decision on this appeal will affect substantial rights of the parties still undetermined, such as: Liability for the fees and charges for services claimed by the receiver against appellant; the apportionment to be made of more than $8,000 in rental money in the hands of the receiver, and some $2,500 additional rentals uncollected during his administration. If the appointment of the receiver was without the jurisdiction of the court, as appellant contends, the substantial compensation claimed by him would not constitute a charge against appellant but only against the person who wrongfully procured the appointment.

[2] The following applicable rules of law on the merits of the case are settled: A superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property between tenants in common. Section 564, Code Civ. Proc., as amended by St.1933, p. 1867, § 85a; 22 Cal.Jur., p. 448, § 25; Goodale v. Fifteenth District Court, 56 Cal. 26, 32; Chalta v. Biller, 212 Cal. 745, 300 P. 821; 20 R.C.L., p. 769.

[3] The main action being one in equity (20 R.C.L., p. 757; Goodale v. Fifteenth District Court, supra), which the superior court had jurisdiction to hear and determine, the court will determine all the issues in order to do complete justice. Watson v. Sutro, 86 Cal. 500, 528, 24 P. 172, 25 P. 64; Hendrickson v. Birtelson, 1 Cal.2d 430, 434, 35 P.2d 318; Davies v. Ramsdell, 40 Cal. App. 432, 183 P. 702.

[4] The appointment may be made "ex parte" and without notice if the "imperative necessity" or emergency is shown in the petition or supporting affidavits. Section 566, Code Civ.Proc.; Real Estate Associates v. Superior Court, 60 Cal. 223, 227; Nichols v. Nichols, 135 Cal.App. 488, 492, 27 P.2d 414; Huellmantel v. Huellmantel, 124 Cal. 583, 589, 57 P. 582.

[5] Since the power to appoint "ex parte" lies in the superior court, the question on appeal is not one of jurisdiction, but of error, and, as such, is limited to the inquiry whether the trial court abused its discretion. 23 R.C.L. pp. 39, 40; Sunset Farms Inc. v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106; Anderson v. Anderson, 124 Cal. 48, 56, 56 P. 630, 57 P. 81, 71 Am. St.Rep. 17.

[6] An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const., art. 6, § 4½; Davies v. Ramsdell, 40 Cal. App. 432, 433, 183 P. 702. Sunset Farms Inc. v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106.

[7] The real basis of appellant's complaint is that the trial court abused its discretion in making the appointment without notice, when notice might easily have been

given. It is not seriously contended that this is a case where a receiver should not have been appointed under any circumstances. Much of the reason behind appellant's complaint is lost by the fact that, within seven days after the appointment, it made a motion to vacate the order and that it was given a full hearing before the motion was denied. There is nothing in the case which shows a want of jurisdiction. The pending emergency and the necessity for the appointment were matters which the trial court was called on to decide, and appellant has failed to show that there was such an abuse of the discretion then exercised that this court should set aside the order.

Furthermore, the full record now before us discloses that appellant was benefited materially by the appointment, that it acquiesced therein by its long and unreasonable delay in bringing this appeal to issue, and that it has shown no prejudicial error warranting a reversal of the order.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

25 Cal.App.2d 322

CORRAL et al. v. SAGER et al.

Civ. 11709.

District Court of Appeal, Second District, Division 2, California.

March 14, 1938.

1. Appeal and error ⇨930(1)

On appeal, the Court of Appeal has duty to view evidence most favorable to respondents.

2. Appeal and error ⇨1004(1)

A verdict will not be set aside on appeal on ground that damages are excessive unless verdict is so outrageously excessive as to suggest at first blush passion, prejudice, or corruption.

3. Death ⇨99(4)

$5,000 to wife and daughter was not excessive for death of man with life expectancy of 24.46 years, where evidence showed that man was in good health and had never been ill at any time for 10 years prior to accident and had never lost weight and never coughed at any time, notwithstanding evidence of defendants that man had tuberculosis and could not have lived a year if he worked.

4. Appeal and error ⇨1060(1)

A reversal will follow reference to defendant's insurance in personal injury suit where it is obvious or fairly deducible that sole purpose of reference was to create prejudice, but, where the reference is merely incidental, or where point is debatable and offers open field for legitimate argument, misconduct will not be found.

5. Appeal and error ⇨1060(1)

In action for death of deceased who was killed when automobile was struck by truck, admitting over objection, evidence of defendants' witness on cross-examination by codefendant that pulley on defendants' truck, which witness had testified on direct, was rusty, had been pointed out to him by insurance agent who came with defendants, was not reversible error, as against contention that evidence was prejudicial reference to defendants' insurance.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Marcelina Corral, by Ysabel Corral, her guardian ad litem, and another, against Victor Sager and others, doing business under the name of Evans Freight Line, and others, for the death of the plaintiffs' father and husband, respectively. From a judgment for the plaintiffs and from an order denying a motion for a new trial, the named defendants appeal.

Judgment affirmed, and appeal from order denying new trial dismissed.

C. Douglas Smith, of Santa Maria, for appellants.

Fred A. Shaeffer, of Santa Maria, for respondents.

CRAIL, Presiding Justice.

This is an appeal by the defendants Victor Sager and Charles J. Evans and Charles H. Evans, alleged to be copartners, doing business under the name of Evans Freight Line, from a judgment in the amount of $5,000 entered against them pursuant to a verdict of the jury and from an order denying a motion for new trial. The plaintiffs were the wife and daughter of Innocente Corral and the action was instituted to recover damages for his death in an automobile collision against the defendants and also against defendants Harry Thole and the county of Santa Barbara, the first of whom was operating another truck which took part in the collision.

[1-3] The first contention of the appellants is that the award of damages is excessive and not supported by the evidence, the contention being that there was certain evidence that the deceased had tuberculosis and could not live a year if he worked. If this were the only evidence before the jury the appellants' contention might be sustained, but it is our duty on appeal to view the evidence most favorable to the respondents. According to this evidence the decedent was in good health and he had never had any sickness or illness at any time for 10 years prior to the accident, and he had never lost weight and never coughed at any time. The appellants stipulated at the trial that the mortality table would show the life expectancy of the deceased at 24.46 years. The jury's verdict will not be set aside on appeal on the ground that the damages are excessive unless the verdict is so outrageously excessive as to suggest at first blush passion, prejudice, or corruption. Corvin v. Hyatt, 10 Cal.App.2d 107, 51 P.2d 176; Bach v. C. Swanston & Son, 105 Cal.App. 72, 83, 286 P. 1097; Kerrison v. Unger, 135 Cal.App. 607, 612, 27 P.2d 927. There is no merit in this contention.

[4, 5] The second contention of the appellants is that the court erred in admitting over the objection of the appellants' evidence that the appellants were insured. The question arose as follows: The appellants had a witness on the stand who had testified for them about making an examination of the two trucks after the accident and about an examination of the pulley on the left-hand side of the cab of one of the trucks. It was on cross-examination, not by the plaintiffs but by the other defendants, that the witness was asked where was the pulley that he testified was rusty, and the witness said he did not remember. When pressed for an answer whether it was on the inside or outside of the cab he said, "I do not remember. My attention was called to it by the insurance agent.

"Q. You say the insurance agent. Whom do you mean by that?

"Mr. Smith: I move that go out as incompetent, irrelevant and immaterial.

"Mr. Stewart: It explains his answer, if the court please.

"Mr. Smith: I was taken by surprise by the answer.

"The Court: Overruled. * * * You have opened it up. I think you have a right to go into all the circumstances involved now. * * *

"The Court: You got him over to the automobile, now, to look at a pulley. Who was with him?"

There was other additional evidence that the witness did not know the insurance agent's name but that he came for him with two of the defendants and took him over to the trucks. There was no reference in the evidence that the defendants were covered by insurance.

In the case of Noble v. Bacon, 129 Cal.App. 177, 185, 18 P.2d 699, 702, the court said, "It might be conceded that where it is obvious or fairly deducible that the sole purpose was to impress that fact of insurance on the minds of the jury, for no other reason than to create a prejudice, then a reversal will follow. But where the reference, as indicated in the cited cases, is merly incidental, misconduct will not be found. And it would seem a fair corollary of the rule that where the point is debatable and offers an open field for legitimate argument, a reviewing court should not arbitrarily undo the results of a trial had under the supervision of the trial judge, whose opportunity of approximating the situation was in the first instance, and who had refused a new trial." There is no merit in this contention.

Finally, the appellants contend that there is no evidence of a partnership consisting of Charles J. Evans and Charles H. Evans. It thus becomes our duty to search the record to see if there is any substantial evidence to sustain the finding of the jury as to the partnership. In our view there is such evidence.

Judgment affirmed. Appeal from order denying new trial dismissed.

We concur: WOOD, J.; McCOMB, J.

25 Cal.App.2d 334

BASCOM v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (two cases).

Civ. 5954, 5955.

District Court of Appeal, Third District, California.

March 15, 1938.

Rehearing Denied April 13, 1938.

Hearing Denied by Supreme Court May 12, 1938.

Constitutional law ⟹318

Awards of compensation based solely on testimony of applicants' witnesses, on the ground that such evidence was sufficient to determine liability, without hearing the alleged employer's defense but only permitting him to testify as a witness called by the commission, were improper as denying due process. Const.Cal. art. 1, § 13; Const. U.S. Amend. 5.

Proceedings by J. P. Bascom, as trustee of the creditors of the J. C. Boyle Lumber Company, and others, against the Industrial Accident Commission of California and Emma G. Huntley and Clad Crawford, respectively, to review the findings and award of the Commission and its order denying a rehearing in a compensation proceeding.

Award annulled.

Evan J. Hughes, of Sacramento, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

PER CURIAM.

Petitioner J. P. Bascom, as trustee of the creditors of J. C. Boyle Lumber Company, seeks to review the findings and award of respondent Industrial Accident Commission, and the order of said commission denying a petition for rehearing.

In one proceeding respondent Crawford was applicant and defendants were J. C. Boyle, J. C. Boyle Lumber Company, J. P. Bascom individually, and as trustee for the creditors of J. C. Boyle Lumber Company, Sam Finegold, Otto Link, Lawrence J. Skirving, individually, and as a creditors' committee operating for the benefit of the creditors of J. C. Boyle and also numerous creditors of the J. C. Boyle Lumber Company.

This application was consolidated for hearing with an application of Emma G. Huntley against the same above-named defendants for fatal injuries to A. E. Huntley, which occurred in the same accident in which Mr. Crawford was injured.

It was found by the commission that Crawford, while in the employ of J. P. Bascom, as trustee and assignee, Lawrence J. Skirving, Otto Link, Sam Finegold, and J. C. Boyle, sustained injuries arising out of and during the course of said employment and finding said employee entitled to compensation from Bascom and others.

In the companion case, the commission found that Arthur E. Huntley, while employed by the same defendants, sustained injuries in the course of his employment, which caused his death. The commission found that the contract of hire under which the decedent was employed at the time of said injury, was entered into between him and the defendants Bascom as trustee, Skirving, Link, Finegold, and Martin. These appeals are taken by Bascom as trustee.

It is urged that Bascom was not the employer within the meaning of the Industrial Accident Commission Act, but was an employee only; and, secondly, that Bascom was denied the right to due process of law in that he was not permitted to present his defense. It is to this latter specification we direct our attention.

The transcript of the proceedings discloses that some four days were consummated in the hearing of the witnesses called on behalf of the applicants. At the conclusion of the fourth day the referee announced that he felt the commission was in a position to make a decision as to the liability involved upon the testimony then before the referee, and that he was loath to grant further time for additional testimony. Objection by the various respondents including Bascom, was made to the matter being submitted, but was overruled.

The order made by the referee was that "the matter is submitted to the Commission on * * * the question of a further hearing, and if granted, the notice will be served on all interested parties." Following some objection by counsel to the effect that a judgment could not be taken against one who had no opportunity to present his defense, the referee further added: "I can't say the Commission will, (take a judgment) but if they do you have a remedy in appealing your proceeding for lack of due process, etc." The record bears out the statement of counsel that Mr. Bascom was not called as a witness in his own behalf, nor given an opportunity to call any witnesses in support of his contentions. It is true he was on the stand, but only as a witness called by the commission, and as stated by counsel for Bascom in objecting to the submission of the matter he had evidence which he wished to present. Opportunity, however, was not afforded him to present such evidence.

We therefore believe, without going further into the merits of the case, that petitioner's point is well taken and that he was denied the right granted him under section 13 of article 1 of the Constitution of California, as well as the Fifth Amendment to the Constitution of the United States, and for that reason the award of the commission as to petitioner should be annulled, and it is so ordered.

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25 Cal.App.2d 325

CITY OF SANTA BARBARA v. MAHER, Mayor.

Civ. 11757.

District Court of Appeal, Second District, Division 2, California.

March 14, 1938.

1. Property 🔑4

In California the phrases "real estate" and "real property" are synonymous.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

2. Landlord and tenant 🔑70

A 99 year lease is an "estate for years" and as such is a "chattel real" and is "personal property" rather than "real property" or "real estate."

[Ed. Note.—For other definitions of "Chattels Real," "Estate for Years" and "Personal Property," see Words & Phrases.]

3. Statutes 🔑196

In statutory construction, under the doctrine of the "last antecedent," relative or modifying phrases are to be applied to the words immediately preceding them and are not to be construed as extending to more remote phrases.

[Ed. Note.—For other definitions of "Last Antecedent," see Words & Phrases.]

4. Municipal corporations 🔑225(1)

"Privileges in connection therewith" as used in provision of the city charter of Santa Barbara prohibiting the conveyance or alienation of the title to real estate or water, water rights and "privileges in connection therewith" except by a vote of the electors, relates under the doctrine of the "last antecedent," only to the words immediately preceding, namely "water rights." St.1927, p. 2066 art. 1, § 2.

5. Municipal corporations 🔑722

Under provision of the city charter of Santa Barbara prohibiting the conveyance or alienation of title to "real estate" or water, water rights and privileges in connection therewith except by a vote of the electors, the city was authorized to lease certain of its property for 99 years to the state of California without submitting the lease to the electorate for its approval. St.1927, p. 2066 art. 1, § 2.

◆

Proceeding in mandamus by the City of Santa Barbara, petitioner, to compel Patrick J. Maher, as Mayor of the City of Santa Barbara, to execute a certain lease on behalf of the city.

Writ granted.

Maxwell Nichols, City Atty., of Santa Barbara, for petitioner.

Alfred W. Robertson, of Santa Barbara, for respondent.

McCOMB, Justice.

This is a proceeding in mandamus to compel respondent, mayor of the City of Santa Barbara, to sign and execute on behalf of said city a lease of certain real property located in the county of Santa Barbara.

In 1925 the state Legislature granted to the City of Santa Barbara all of the tide lands and submerged lands bordering said city. In 1929 the city constructed a breakwater, and as a result thereof by the year 1936 several acres of sand had accumulated along the northerly side of the breakwater, which prevented the tide from flowing over the land as formerly. In 1937 the Legislature granted all of the state's title in and to the accretions above mentioned to the City of Santa Barbara, and authorized the city to lease the aforementioned accretions to the state of California to be used by the latter for a state college athletic field in connection with the Santa Barbara State College. January 24, 1938, the city council of

Santa Barbara ordered the execution of a 99 year lease of the aforementioned property to the state of California, but respondent mayor has refused to sign and execute the lease as directed on the ground that since the electors of the City of Santa Barbara have not approved the lease the city is without authority to enter into the transaction, in view of section 2, article I, of the city charter, which reads in part as follows: "Provided, however, the title to real estate or water, water rights and privileges in connection therewith shall not be conveyed or aliened except by a vote of the electors at an election held for that purpose." St.1927, p. 2066.

These are the questions presented for determination:

First: Is a 99 year lease of real property a conveyance of real estate?

Second: Does the phrase "privileges in connection therewith" as used in section 2, article I, of the Santa Barbara city charter modify the words "real estate"?

[1, 2] The answer to the first question must be in the negative. In California the phrases "real estate" and "real property" are synonymous. Dabney v. Edwards, 5 Cal.2d 1, 6, 53 P.2d 962, 103 A.L.R. 822. A 99 year lease is an estate for years; and it is settled that an estate for years is a chattel real and is personal property, and thus is not real property or real estate. Callahan v. Martin, 3 Cal.2d 110, 118, 43 P.2d 788, 101 A.L.R. 871; Dabney v. Edwards, 5 Cal.2d 1, 10, 53 P.2d 962, 103 A.L.R. 822.

[3] The second question must also be answered in the negative. It is a settled rule of statutory construction that relative or modifying phrases are to be applied to the words immediately preceding them and are not to be construed as extending to more remote phrases. County of Los Angeles v. Graves, 210 Cal. 21, 26, 290 P. 444; Puget Sound Electric Railway v. Benson, 9 Cir., 253 F. 710, 711.

The rule is thus accurately stated in 59 Corpus Juris 985: "By what is known as the doctrine of the 'last antecedent', relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

[4] Applying the foregoing rule to section 2, article I, supra, of the Santa Barbara city charter it is apparent that the phrase "privileges in connection therewith" relates only to the words immediately preceding, namely, "water rights."

[5] It thus appears that, since the 99 year lease is not "real estate," and there is no requirement in the city charter of Santa Barbara that, before the city leases real property owned by it, the lease must be submitted to the electorate for its approval, petitioner herein was not without authority to lease the property above mentioned to the state of California.

For the foregoing reasons let the peremptory writ issue as prayed.

We concur: CRAIL, P. J.; WOOD, J.

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25 Cal.App.2d 286

HENSLEE v. FOX et al.

Civ. 10444.

District Court of Appeal, First District, Division 2. California.

March 10, 1938.

Hearing Denied by Supreme Court May 9, 1938.

1. Automobiles 🔑245(82)

Whether motorcyclist who collided with truck was contributorily negligent in driving on left-hand side of street was for jury, in view of fact that trucks were parked at right angles to street on right-hand side of street and other conditions. St.1923, p. 557, as amended by St.1931, p. 2124.

2. Automobiles 🔑173(1)

A truck driver who collided with plaintiff's motorcycle was bound to look before starting to move truck from place where it was parked. St.1925, p. 413, § 130(a).

3. Appeal and error 🔑930(4)

On review of judgment for plaintiff in action arising out of collision between plaintiff's motorcycle and defendants' truck, court was required to assume that jury did not accept testimony of truck driver in conflict with motorcyclist's testimony as to whether truck was standing still or moving, and was required to assume that jury found truck driver guilty of negligence.

4. Appeal and error 🔑1097(1)

An opinion on former appeal did not constitute "law of the case" governing the second trial, where evidence on the second trial was substantially different from that on first trial.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

5. Appeal and error ⚷1064(4)

In automobile accident case, charge that Motor Vehicle Act did not apply if accident occurred in place not "customarily" used by general public as a thoroughfare, but that defendant owed duty to exercise ordinary care in any event, was not prejudicial to defendant, although statute defining "public highway" does not employ word "customarily." St.1931, p. 2102, § 21.

6. Trial ⚷296(3)

In action arising out of collision between plaintiff's motorcycle and defendants' truck, instruction predicating recovery on finding that truck driver failed to give plainly visible signal to motorcyclist of his intention to start or turn truck upon highway and that such negligence was "sole" proximate cause of motorcyclist's injury, considered with other instructions, was not erroneous because of failure to require finding that plaintiff was free from negligence, since use of word "sole" implied such limitation.

7. New trial ⚷9

In personal injury action, where evidence indicated that issue of damages could be separately tried apart from the facts of the accident, trial court did not abuse discretion in granting plaintiff new trial on sole issue of damages.

8. New trial ⚷9

It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others.

9. Damages ⚷30

In action for injuries sustained by motorcyclist in collision with truck, where motorcyclist was injured solely through negligence of truck driver, motorcyclist was entitled to compensatory relief in addition to special damages. Civ.Code, § 3281.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by James Henslee against John Fox and another for injuries sustained when plaintiff's motorcycle collided with defendants' truck. Judgment for plaintiff for $5,000, and from an order granting plaintiff a new trial on the sole issue of damages, defendants appeal.

Affirmed.

For prior opinion, see 74 P.2d 322.

Cooley, Crowley & Supple, of San Francisco, for appellants.

Ingemar E. Hoberg, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal taken by the defendants from a judgment against them in a personal injury case and from an order granting plaintiff a new trial on the sole issue of damages. It is the second appeal. Henslee v. Fox, 10 Cal.App.2d 202, 51 P.2d 1176.

[1] The accident happened at about 10:30 a. m. on November 7, 1932. The place was in Berry street between Third and Fourth streets in San Francisco. Berry street runs east and west, and Third and Fourth streets run north and south. Grocers Terminal building extends along the entire southern side of Berry street and a railroad track extends along the entire northern side. The space between is used as a street although the fee is vested in the Southern Pacific Company. At the time of the accident there were lined up in Berry street on the south side nine different vehicles. Each stood at a right angle to the line of the street. The majority of them stood closely abutting the Grocers Terminal building. One, about 125 feet west of the accident, was abutting the middle line of Berry street. That vehicle was marked H-two. Another stood about 75 feet east. It extended from the south line to the middle line of the street. Between those two another stood at a point almost opposite the truck being operated by Forrest, one of the defendants. On the north side of the street there were, including said truck, five different vehicles, all of which, except the truck stood at right angles to and closely abutting the railroad track. The street is 57 feet wide measuring from the north line of the Grocers Terminal building to the railroad track. The evidence was conflicting as to whether the defendants' truck was moving or at a standstill. But it was in a position northwest to southeast with its front wheels turned somewhat to the right with

the rear end toward the railroad. It was about 25 feet long.

The plaintiff entered Berry street from Third street, drove down the space between the fronts of the trucks, and delivered a package at the premises occupied by Sussman-Wormser & Company at the west end of the block. He then turned his motor car around and started to return to Third street. He was driving a motorcycle with a sidecar attached. Including the extension of the handles it was about as wide as an automobile. He testified that as he started east he was at once compelled to drive in the middle of Berry street or on his left to pass the vehicle H-two. As he continued farther he was in the middle or partly on his left-hand side of the street. When he was 50 or 60 feet west of the defendants' truck it was standing still. The plaintiff testified he continued on his course and when he was three or four feet from the truck it moved forward, the front wheel ran over the left pedal of the motorcycle and broke his left leg.

The defendants assert that the plaintiff, at the time of the accident, was driving on his left-hand side of the street. The plaintiff quotes the record to show he was compelled to do so by reason of the traffic in the street. The defendants claim the showing is insufficient to excuse the plaintiff's acts. We think it is sufficient. As the plaintiff drove east from Sussman-Wormser & Company he was compelled to pass in front of nine vehicles abutting the grocery building. One of those vehicles extended out nearly to the middle line of the street. Three others extended out 12 to 15 feet and the space between such last-mentioned vehicles and the middle line was about 8 feet. The plaintiff's machine and attachments were about as wide as an automobile. The defendants then argue that there was a foot and one-half of space more than enough if the plaintiff had barely missed the parked vehicles and had remained in his right-hand side of the street. The plaintiff testified regarding the positions and movements of each of the vehicles which we have mentioned. He also testified that when he had made his delivery at the office of Sussman-Wormser & Company he returned to his motorcycle, turned it around in the western end of Berry street, and started back the way he had come. Plaintiff saw defendants' truck when he was about 40 or 50 feet away. He testified he continued to observe it and drove forward at a speed of 10 or 12 miles, but on nearing it he dropped to a speed of six or seven miles. He did not weave in and around the standing vehicles but drove near the middle line. When making the turn in front of Sussman-Wormser & Company he was at times on the left-hand side, later he was partly on the left and partly on the right-hand side of the middle line of the street. At the time of the impact the front of defendants' truck was one and one-half or two feet from the middle line of the street and the front of the opposite vehicle was about four feet from the middle line of the street. The space between was a little more than the width of an automobile. By its verdict the jury found that the plaintiff was driving as near his right-hand side of the street as, in the exercise of reasonable care, he could in view of the congestion of the traffic. We may not disturb that implied finding.

The defendants contend the plaintiff was guilty of contributory negligence as a matter of law because he was driving in part, at least, on his left-hand side of the street. That at times he was so driving will be conceded. It must also be conceded that Berry street is a narrow street, much used by trucks for parking and for traveling, and that at the time of the accident there were many trucks and other vehicles within its bounds. Furthermore, the trucks at times backed to the north side or the south side and parked. That some of such trucks when so parked extended from the exterior boundary of the street out to approximately the middle line of the street. At the time of the accident section 122 of the California Vehicle Act, St.1923, p. 557, as amended by St.1931, p. 2124, provided as follows: "(a) Upon all highways of *sufficient width,* other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway, except when the right half is out of repair and for such reason impassable, or when overtaking and passing another vehicle subject to the limitations set forth in section 125." As the plaintiff drove east on his return trip he was bound not to drive so close to the front ends of the vehicles parked on the right-hand side of Berry street as to endanger them. Furthermore, said driver would, or should, be aware that any one of the parked vehicles might start forward at any moment. As to where Berry street was or was not *"of sufficient width,"* to allow the plaintiff to drive on his right-hand side became a question of fact for consideration and determination by the jury and not solely a question of law. By its verdict the jury also determined that issue in favor of the plaintiff. Considering all of the facts we may not say the plaintiff was guilty of negligence as a matter of law.

[2, 3] As stated above, when the plaintiff was within three or four feet of the truck he then saw it move. For about five minutes before that it had been standing still. When he was in that place he testified the driver of the truck started forward and collided with the plaintiff's motorcycle. Immediately before the impact, under the uncontroverted evidence, the plaintiff had proceeded in the unoccupied zone and had traversed it for a distance of about 150 feet. He says he was given no warning. Before the driver of the truck started to move be was bound to look. Our statute provides: "The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety." California Vehicle Act, § 130 (a), St.1923, p. 558, as amended by St.1925, p. 413. The view of the driver of the truck was not obstructed. In fact, he testified he was looking at the movements of the plaintiff. However, he also claimed his truck was at a standstill and, without looking, the plaintiff ran into the parked truck. In support of the verdict we must assume the jury did not believe and did not accept as true the statement of the truck driver, and found him guilty of negligence.

[4] The defendants claim that Henslee v. Fox, supra, is the law of the case. In their briefs they are contended to state that the evidence introduced on the second trial was the same as the evidence that was introduced on the first trial. The plaintiff claims it was substantially different in certain material respects and specifies the particulars. We think it was substantially different as clearly appears by a comparison of the facts stated in our former decision with the facts herein set forth. Under these circumstances the doctrine of the law of the case is not applicable. Madsen v. Le Clair, 125 Cal.App. 393, 13 P.2d 939; Wallace v. Sisson, 114 Cal. 42, 45 P. 1000.

[5] Acting upon the request of the plaintiff the trial court instructed the jury as follows:

"If you find from the evidence that the place where this accident occurred was not *customarily* used by the general public as a thoroughfare, then the provisions of the Motor Vehicle Act do not apply.

"However, in either event, the defendants are not absolved from the duty of exercising ordinary care for the safety of others. In determining whether or not ordinary care was exercised, you may ask yourselves this question: 'Did the defendant Forrest exercise that degree of care and caution that would have been exercised by an ordinarily careful and prudent person acting in same or similar circumstances?' "

The defendants complain of the presence of the word "customarily." They contend that the statute contains no such limitation. The statute is section 21 of the California Vehicle Act, St.1923, p. 519, as amended by St.1931, p. 2102. It does not contain the word "customarily." But the insertion of that word was not prejudicial. Both the general law and the California Vehicle Act impose on the operators of vehicles the duty to exercise reasonable care not to injure others. Other instructions stated the same rule. Read as a whole, the charge of the court correctly stated the law on the subject.

[6] The court in like manner gave another instruction: "If you find from the evidence in this case that the place where the accident occurred was a highway *customarily* used by the general public, and you further find that the driver of the truck in question started or turned his truck upon such highway at a time when the plaintiff might reasonably be affected by such movement, and failed or omitted to give a plainly visible signal to plaintiff of his intention to make such movement, then the driver of the truck was negligent. If such negligence, if any, was the sole proximate cause of plaintiff's injury then your verdict must be in favor of the plaintiff without the necessity of further proof of negligence on the part of the defendants." Defendants contend that as given it was a formula instruction and failed to state "and that the plaintiff was free from negligence." That criticism is not well founded. The use of the word "sole" implied the limitation, the omission of which the defendants complain. When read in connection with the other instructions which were given, the instruction was not an incorrect statement of the law.

[7] After the verdict had been recorded each party separately made a motion for a new trial. The court denied the motion of the defendants but granted the motion of the plaintiff "on the sole issue of damages on ground of insufficiency of evidence to justify the verdict." From that order the defendants also appealed.

In support of the order of the trial court the plaintiff calls our attention to the facts that the verdict was for $5,000. It is conceded that by reason of the uncontradicted evidence relating to special damage, this award allowed no more than $363.69 as compensation for general damage such as pain, suffering, and permanent disability. This latter allowance the plaintiff asserts was wholly inadequate under the facts and therefore the order granting a new trial on the sole issue of damages should be affirmed.

[8, 9] The defendants reply that the power to grant a new trial of part of the issues of a case is dependent upon the undoubted separability and distinctness of the issues and the absence of a resulting prejudice to the rights of the other party. Continuing, they claim that the facts in the instant case show the order should not have been made and therefore it was an abuse of discretion to make it. They concede the rule in this state is as stated in Re Estate of Everts, 163 Cal. 449, at page 452, 125 P. 1058, 1059: "It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature to order a new trial of one issue and refuse it as to the others. San Diego L. & T. Co. v. Neale, 78 Cal. [63] 64, 20 P. 372, 3 L.R.A. 83; Duff v. Duff, 101 Cal. [1] 4, 35 P. 437; Mountain, etc., Co. v. Bryan, 111 Cal. [36] 38, 43 P. 410." However, they claim the facts of this case do not bring it within said rule. We think they do. If the plaintiff was injured through no fault of his own but solely by the negligence of the defendants, in an action against the latter he was entitled to compensatory relief. Civ.Code, § 3281. The elements of his damages are well settled. Kline v. Santa Barbara R. Co., 150 Cal. 741, 748, 90 P. 125. Proof of any element of plaintiff's damages will not require the taking of a particle of evidence involving the manner of the breaking of the plaintiff's leg, that is, the facts of the accident. The new trial will be on matters wholly distinct and separable from the issues on which defendants' motion for a new trial was denied. We see nothing in the nature of abuse of discretion in making the order.

The order and judgment appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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25 Cal.App.2d 294

SITKEI et al. v. RALPHS GROCERY CO.

Civ. 11648.

District Court of Appeal, Second District, Division 2, California.

March 10, 1938.

Hearing Denied by Supreme Court May 9, 1938.

1. Appeal and error 🔑996

A trial jury's fact finding will not be disturbed on appeal where different conclusions may be reasonably drawn from the evidence by different minds.

2. Negligence 🔑135

Evidence *held* to justify judgment denying husband and wife recovery against store owner for injuries received by wife when she came in contact with small bolt on handle of hand truck being moved by store employee when wife was walking down aisle of store on ground that wife was guilty of contributory negligence in endeavoring to pass employee at time he was moving truck.

3. Appeal and error 🔑201(2), 719(1)

Error cannot be predicated on misconduct of trial judge in making remarks during trial and questioning witnesses unless harmful result of such misconduct cannot be obviated by appropriate instructions, in absence of assignment of such misconduct as error and request to trial court to instruct jury to disregard it.

4. Appeal and error 🔑201(2), 719(1)

On appeal from judgment denying husband and wife recovery against store owner for injuries received in store by wife, whether trial judge committed prejudicial error in remarks made during trial and in questioning witnesses would not be considered, where such misconduct was not assigned as error and no request was made of trial judge to instruct jury to disregard alleged misconduct, although harm thereof, if any, might have been obviated by appropriate instructions.

5. Appeal and error ⚷1064(1)

In action by husband and wife against storekeeper for injuries received by wife in store, instruction that presumption existed that wife and employee of store exercised ordinary care and that such presumption was sufficient on which to base finding that either or both did exercise such care, in absence of evidence to contrary, was not prejudicial to husband and wife.

6. Negligence ⚷138(3)

In action by husband and wife against store owner for injuries received by wife in store, instruction defining unavoidable accident as accident which occurs without fault of any of parties and that wife could not recover if injuries resulted therefrom was not error, where store owner had filed general denial of general allegation of negligence.

7. Negligence ⚷119(3), 138(3)

Under a general denial by defendant of a general allegation of negligence, defendant may rely on defense of unavoidable accident and does not waive such defense by failure to plead it, and in such case instruction on doctrine of unavoidable accident upon request is proper.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Bertha Sitkei and another against the Ralphs Grocery Company for injuries received by the named plaintiff in defendant's store. Judgment for defendant after a jury trial, and plaintiffs appeal.

Affirmed.

Samuel A. Rosenthal and Burton Briggs Crane, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, (by Philip C. Sterry), of Los Angeles, for respondent.

McCOMB, Justice.

Viewing the evidence most favorable to defendant (respondent) the facts are:

October 5, 1935, plaintiff Bertha Sitkei, wife of plaintiff George Sitkei, entered defendant's store in the city of Santa Monica and proceeded to walk down an aisle between the fruit and grocery departments. Mr. McPherson, an employee of defendant, had left a small hand truck in the passageway. As he stooped and started to pick up the truck by the handles, plaintiff Mrs. Sitkei, who had been walking down the aisle behind Mr. McPherson, attempted to pass him and, as she did so, a small bolt on the handle of the truck came in contact with her elbow, causing personal injury to her.

The following questions are presented for determination:

First: Was there substantial evidence to sustain the implied finding of the jury that plaintiff was contributorily negligent?

Second: Did the trial judge commit prejudicial error in

(a) Making remarks during the course of the trial, and

(b) Questioning witnesses?

Third: Did the trial court commit prejudicial error in instructing the jury as follows:

(a) "It is a presumption of law that both the plaintiff, Mrs. Sitkei, and the employee of the defendant, Ralphs Grocery Company, exercised ordinary care, and in the absence of evidence to the contrary such presumption is sufficient to base a finding that either or both did exercise such care."

(b) "An unavoidable accident is one which occurs without fault or negligence upon the part of any of the parties thereto. In this connection I instruct you that if you find from the evidence in this case that the collision between Mrs. Sitkei and said hand truck was not the result of any fault or carelessness upon the part of either the employee of Ralphs Grocery Company or Mrs. Sitkei then I instruct you that said collision was an unavoidable accident and that plaintiffs cannot recover for the damages, if any, as a result thereof."

[1] The first question must be answered in the affirmative. The law is settled in this jurisdiction that, where different conclusions may be reasonably drawn from the evidence by different minds, the trial jury's finding of fact will not be disturbed on appeal. Meindersee v. Meyers, 188 Cal. 498, 502, 205 P. 1078. The conclusion either that plaintiff Bertha Sitkei's conduct in endeavoring to pass defendant's employee while he was raising the hand truck was or was not consonant with the acts of a reasonably prudent person may be reasonably drawn from the facts in the present case.

[2] Applying the rule of law above stated, the jury's implied finding that plaintiff did not act as a reasonably prudent person in thus endeavoring to pass him at the time and was therefore contributorily negligent finds substantial support in the evidence and will not be disturbed by this court.

[3] The problems presented in the second question will not be considered by this court for the reason that plaintiffs did not lay the proper foundation in the trial court for review here. Unless the harmful result of the alleged misconduct of the trial judge cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it. Hughes v. Hartman, 206 Cal. 199, 206, 273 P. 560; 4 C.J.S. 558, Appeal and Error, § 288 (1937); 2 Cal.Jur. 281, Appeal and Error, § 90 (1921); 1 Cal.Jur. Ten Year Supp. 31 (1936).

[4] In the instant case plaintiffs did not assign the trial judge's alleged misconduct as error, nor did they request him to instruct the jury to disregard such alleged misconduct, although the harm thereof, if any, might well have been obviated by appropriate instructions.

[5] The instruction set forth in paragraph (a) of the third question was not prejudicial to plaintiffs. The giving of a similar instruction under like circumstances in Medeiros v. Soares, 17 Cal.App.2d 176, 178, 61 P.2d 501, was held not to constitute prejudicial error.

It was not error to give the instruction set forth in paragraph (b) of the third question. The law is settled that under a general denial by defendant of a general allegation of negligence defendant may rely upon the defense of unavoidable accident and does not waive such defense by failing to specifically plead it (Pearce v. Elbe, 98 Cal.App. 101, 106, 276 P. 389), and it is proper in such a case for the court upon request to instruct the jury on the doctrine of unavoidable accident. Pearce v. Elbe, 98 Cal.App. 101, 105, 276 P. 389.

It appears from an examination of the record that the trial court fully, fairly, and accurately instructed the jury upon all questions of law necessary for their consideration and no prejudicial error appears in the record.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J., WOOD, J.

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25 Cal.App.2d 309

AYAKO SAKAMU v. ZELLERBACH PAPER CO. et al.

Civ. 9506.

District Court of Appeal, First District, Division 1, California.

March 14, 1938.

1. Appeal and error 🔑934(1)

Conflicts of evidence must be disregarded in determining whether a motion for judgment notwithstanding the verdict should have been granted, and evidence must be viewed in the light most favorable to the one in whose favor the verdict of the jury was rendered, and, if there is no evidence of sufficient substantiality to support a verdict in favor of such party, the judgment notwithstanding the verdict should be affirmed.

2. Judicial sales 🔑31(3)

Although a purchaser at a judicial sale acquires no title until confirmation, he does not necessarily in every case acquire title at time of the confirmation.

3. Judicial sales 🔑1

The court is the vendor in the case of a judicial sale, but the sale is a "contract," being the result of an offer on the one part and its acceptance on the other.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

4. Sales 🔑199

Where sale is made by written offer and an acceptance in writing, the intention of the parties as to when title shall pass is to be gathered from those writings, and those alone, in the absence of any ambiguity therein.

5. Receivers 🔑141

Where sale of newspaper was effected by written offer of purchaser, recommended for acceptance by the receiver of newspaper, and acceptance by court, in accordance with so-called confirmation of sale, the offer and acceptance by confirmation would govern as to when title to the newspaper passed.

6. Judicial sales ⚷50(1)

The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, although in the meantime the property is held in trust for him, and the beneficial ownership of the property is vested in him, so that any increase or decrease in value inures to him.

7. Libel and slander ⚷74

Where written offer and confirmation of sale of newspaper by receiver to a creditor in effect provided that receiver should not transfer title until payment for the newspaper and that purchaser was not required to pay except on receipt of an instrument transferring title, purchaser was not liable for a libel published between the time of confirmation and delivery of the bill of sale and before the purchaser took possession, because of the fact that purchaser was equitable owner of the newspaper.

8. Contracts ⚷169, 170(1)

Evidence of circumstances under which a contract is entered into, or evidence as to contemporaneous construction placed upon contract by the parties, is admissible only when the contract is ambiguous.

9. Libel and slander ⚷112(1)

In action for libel published after confirmation of sale of newspaper to a creditor and before delivery of the bill of sale and taking of possession by the buyer, evidence *held* to sustain judgment for buyer on ground title had not passed at time of publications complained of and did not pass until subsequent delivery of bill of sale.

10. Evidence ⚷448

In action for libel published after confirmation of sale of newspaper to a creditor and before delivery of bill of sale and taking of possession by buyer, order of bankruptcy court enjoining prosecution of suit for libel against receiver in bankruptcy, which stated that receiver and the bankrupt's estate were not owners of newspaper after the order of confirmation, was not admissible to show intention of parties on question when title to property passed, where contract of sale was not ambiguous. Code Civ.Proc. § 1908, subd. 1.

11. Judgment ⚷829(3)

In action for libel published after confirmation of sale of newspaper to a creditor and before delivery of bill of sale and taking of possession by buyer, order of bankruptcy court enjoining prosecution of suit for libel against receiver in bankruptcy, which stated that receiver and the bankrupt's estate were not owners of newspaper after the order of confirmation, was not admissible as an adjudication in rem binding against buyer of the newspaper. Code Civ.Proc. § 1908, subds. 1, 2.

12. Judgment ⚷812(3)

Any proceeding which is designed or the primary purpose of which is to establish status is to that extent a proceeding in rem, and the judgment or decree, if upon the merits, is as conclusive as any other judgment in rem.

13. Judgment ⚷742

Where an action or proceeding is such that a particular status, though directly in issue, is only incidentally involved, the resulting judgment is res judicata as to that status only as a judgment in personam, subject to all the limitations governing the operation of such judgments as res judicata, and, if conclusive, binds only the parties and privies or other persons who may be concluded by such an adjudication.

14. Judgment ⚷829(3)

In action for libel published after confirmation of sale of newspaper to a creditor and before delivery of bill of sale and taking of possession by buyer, order of bankruptcy court enjoining prosecution of suit for libel against receiver in bankruptcy which stated that receiver and the bankrupt's estate were not owners of newspaper after the order of confirmation, was inadmissible, since such order, enjoining prosecution of suit in state court for tort charged against the receiver, was void for lack of authority on part of Federal District Court. Code Civ.Proc. § 1908, subd. 1.

15. Libel and slander ⚷74

An action of libel based upon publications printed and published in Japanese language could not be maintained against business manager of newspaper who did not understand Japanese language, in absence of proof that he had control over editorial staff, and that business manager had knowledge of preparation or contents of articles before their publication.

16. Libel and slander ⚿=74

In libel action against distributor of newspaper or periodical, a showing that distributor had no knowledge of the libelous matter and that there were no extraneous facts which should have put him on his guard constitutes a defense.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Ayako Sakamu against the Zellerbach Paper Company and others for libel. From an adverse judgment, the plaintiff appeals.

Affirmed.

Elmer P. Delany, of San Francisco, for appellant.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco, for respondents Zellerbach Paper Co., William H. Marsh, J. C. McCrary, and A. A. Axelrod.

Clarence E. Todd, of San Francisco, for respondent Japanese American News Pub. Co.

PER CURIAM.

A verdict in favor of the plaintiff having been rendered in this action, the court, on motion of the defendants, entered judgment in their favor notwithstanding the verdict.

The action arose out of the publication of certain articles in the "Japanese American News," a newspaper printed in the Japanese language and circulated among Japanese people, the articles appearing on March 12, 14, 15, and 16, 1932. No question is raised as to the libelous character of the matter published, nor that the plaintiff is entitled to damages from the person or persons responsible for the publication; the question for consideration and decision here, as stated by the parties in their briefs, being whether there is any evidence sufficient to warrant a finding that the defendants, or any of them, are responsible therefor, either as owners or publishers of the newspaper, or under the doctrine of respondeat superior.

The Japanese American News was originally published by one K. Abiko. Abiko becoming financially involved, his property and business, including the newspaper and its operating equipment, were in September, 1931, by order of the superior court, placed in the hands of defendant William H. Marsh as receiver, the appointment of this gentlemen being at the suggestion of defendant Zellerbach Paper Company, the principal creditor. Very shortly thereafter other creditors of Abiko instituted proceedings in the United States District Court to have him declared a bankrupt, and this was done, George K. Naus being appointed as receiver of the estate. As such receiver he continued publication of the newspaper, and retained defendant Marsh as its business manager. Thereafter Zellerbach Paper Company, through its attorney, Philip S. Ehrlich, entered into negotiations with the receiver through the latter's attorney, R. G. Hunt, for the acquisition of the newspaper, and apparently agreed upon terms which the receiver would be willing to recommend to the court for its sale. These terms were embodied in a written offer by the paper company, and the property to be acquired included, among other things, "machinery, equipment, accounts receivable, cash on hand, including also all assets of the newspaper now being published by said George K. Naus." The written offer was quite lengthy, and the last three paragraphs thereof were in the following terms:

"13. The undersigned shall receive all surplus cash on hand after all bills incurred by the said bankrupt receiver in the operation of the said newspaper have been paid; and if it shall appear that there is not sufficient cash on hand to pay such bills the receiver may make up such deficiency by retaining such portion of the accounts receivable as may be necessary to provide cash to liquidate such deficiency.

"14. The payment of the purchase price hereunder shall be subject to receipt by purchaser of a good and sufficient title to said assets, and this offer to purchase is conditioned upon an order of this court confirming said offer to purchase without modification, and upon said order, if made, becoming final."

The proposed sale was submitted to the District Court, which on March 7, 1932, made an order in writing, accepting the offer according to its terms and authorizing and confirming the proposed sale. The language of the order in that behalf is:

"Now, therefore, it is hereby ordered that the offer of the Zellerbach Paper Company to purchase those assets of the estate of K. Abiko, an alleged bankrupt, as said assets are described in the offer of said Zellerbach Paper Company attached to the return of said proposed sale and also hereto, be, and the same is hereby accepted, and that the proposed sale in accordance with said offer be, and the same is hereby confirmed.

"And it is hereby further ordered that said George K. Naus, as receiver in bankruptcy of the estate of K. Abiko, an alleged bankrupt, be, and he is hereby, authorized and directed to execute and deliver to the said Zellerbach Paper Company, upon receipt of the purchase price, a bill of sale, and/or other good, proper and sufficient instrument of title to the said property so sold and/or proposed to be sold."

The newspaper being a going concern, with claims accruing, expenses being incurred and the amount of bills receivable changing daily, it was necessary for the attorneys for the paper company and the receiver to fix a date upon which the bill of sale would be made and the amount of cash in the receiver's hands and bills receivable be determined, and for that purpose March 18 was selected; and it was found that on that date the amount of cash in the hands of the receiver to be paid over to the Zellerbach Paper Company was the sum of $1,721.60. The attorneys, however, were not ready to complete the transaction on that day, the form which payment to the receiver for the property was to take requiring the preparation of numerous documents, such as agreements on the part of third parties, proof of labor claims, waivers and withdrawals, etc. On March 26, as a step in the completion of the transaction the paper company's attorney addressed to and delivered to the receiver a letter and various annexed documents, the letter containing a statement to the effect that: "You are to hold the foregoing documents in escrow subject to the performance of the order of the United States District Court for the Northern District of California in the Matter of K. Abiko, Bankrupt, No. 21,135K, made on the 7th day of March, 1932, in which order the offer of Zellerbach Paper Company to purchase the assets of the estate of K. Abiko was confirmed; and you are hereby requested to execute the bill of sale hereto attached, or other good, sufficient and proper instrument of title to the property sold or proposed to be sold as of March 18, 1932, as set forth in said order. * * * Upon your delivery to me of the documents requested as hereinabove set forth, you may file, record or otherwise make use of, the documents handed to you; and the Zellerbach Paper Company agrees that in the event there has been any indebtedness incurred by you as receiver in the estate of K. Abiko in the operation of the newspaper owned by said estate, to wit, the Japanese American News of San Francisco recourse may be had to the accounts receivable transferred by you to the Zellerbach Paper Company for the payment of such indebtedness. Upon the full consummation of this transaction the Zellerbach Paper Company will cause to be filed in the office of the Recorder of the city and county of San Francisco a satisfaction of the chattel mortgage now existing upon the portion of the property being transferred to it under the aforesaid order of court."

This letter was formally accepted by the receiver through his attorney as carrying out the terms of the sale.

Following the delivery of this letter and documents and on March 28, 1932, the bill of sale dated March 18, 1832, was delivered to the Zellerbach Paper Company.

As this company intended not itself to operate the newspaper but to cause a corporation to be formed for that purpose, it had had prepared a bill of sale from itself to J. C. McCrary and Albert A. Axelrod of the same assets or property so transferred to it, and bearing the same date as the receiver's bill of sale, namely, March 18, 1932. This bill of sale was likewise delivered on the 28th day of March; and thereafter McCrary and Axelrod commenced the operation of said newspaper and continued such operation until the defendant Japanese American News Publishing Company was organized, when, on June 22, 1932, they transferred said property and assets to that corporation by bill of sale of that date.

As already stated, the libelous articles were published on March 12, 14, 15, and 16. On March 16, 1932, Marsh, the business manager of the newspaper, following his usual custom, prepared and sent to receiver Naus for signature a number of checks for the purpose of paying wages, salaries and other expenses of the paper for a period of time commencing at a date prior to March 7 and extending to the date of the checks. These Naus refused to sign, taking the position for the first time that the interest of the bankrupt estate in the Japanese American News ceased upon the making of the order of sale of March 7th. Accordingly, Marsh prepared other checks in amounts sufficient to pay such expenses up to March 7; and on March 16 or 17 and thereafter deposited all moneys received in a bank account which he opened in his own name as trustee; and when later the bill of sale to McCrary and Axelrod was delivered to them the balance in this account was turned over to them and went to swell the funds and assets received by them under such bill of sale, and it was from this account that the expenses just mentioned were ultimately paid. Up to the time of the receipt by it of its bill of sale by the trustee on March 28, no action of any kind was taken by the Zellerbach Paper Company or its agents to take over the newspaper plant or other assets, or in any way to operate or control the business, nor is there any evidence of any tender thereof to it by the receiver.

In support of her appeal the plaintiff urges that the trial court erred in rendering judgment for the defendants since there was sufficient evidence to warrant a finding implied by the jury's verdict that title to the Japanese American News passed to the Zellerbach Paper Company on March 7, 1932, and that such company as owner, and the other defendants as agents and employees, were operating the paper on the dates of publication of the libels.

[1] The parties are in accord upon the legal proposition that in considering the evidence to determine whether a motion for judgment notwithstanding the verdict should have been granted all conflicts must be disregarded, and the evidence must be viewed in the light most favorable to the one in whose favor the verdict of the jury was rendered; and that, on the other hand, if in applying the foregoing rule the result is a determination that there is not evidence of sufficient substantiality to support a verdict in his favor the judgment notwithstanding the verdict should be affirmed. Estate of Flood, 217 Cal. 763, 21 P.2d 579; Estate of Caspar, 172 Cal. 147, 155 P. 631. In this behalf the appellant contends that as matter of law title to the newspaper passed to the paper company by the confirmation of sale on March 7, and, further, that certain evidence which was admitted shows this to have been the intention of the parties to the sale.

[2-4] As establishing the first phase of its contention, the appellant cites cases holding that in a judicial sale title does not pass until confirmation by the court. It does not follow, however, from the fact that the purchaser acquires no title until confirmation that he does so upon confirmation in every case. In a judicial sale the court is the vendor (In re Maloney, 21 A.B.R. 502; In re Jungmann, 2 Cir., 186 F. 302, 26 A.B.R. 401), but the sale is, nevertheless, a contract, it being the result of an offer on the one part and its acceptance upon the other. Where the sale is made by written offer and an acceptance in writing, the intention of the parties as to when title shall pass is to be gathered from those writings, and those alone, in the absence of any ambiguity therein.

[5] The present sale was effected by the written offer of the Zellerbach Paper Company, recommended for acceptance by the receiver, and accepted by the court in its so-called confirmation of sale. Such offer and acceptance by confirmation must govern as to when title passed.

[6, 7] It will have been seen from the quotations we have made from the written offer and confirmation of sale, that their effect is to clearly provide that the receiver should not transfer title to the property until payment therefor, and on the other hand, the purchaser was not required to pay except upon receipt of an instrument transferring title. As we have seen, payment and delivery of the bill of sale were made on March 28, twelve days after publication of the last of the libelous articles. As is said in Cropper v. Brown, 76 N.J.Eq. 406, 74 A. 987, 139 Am.St.Rep. 770, the legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, although in the meantime the property is held in trust for him, and the beneficial ownership of the property is vested in him, so that any increase or decrease in value inures to him. Conceding that between confirmation of sale and delivery of the bill of sale the purchaser is the equitable owner, we know of no principle of law which imposes upon such equitable owner liability for a tort committed by the legal owner in possession.

On the question of what evidence the record discloses in support of the jury's implied finding that the Zellerbach Paper Company became the owner of the Japanese American News upon confirmation of the sale, the appellant makes no claim that upon the making of the order of confirmation the receiver, either actually or symbolically, turned over to said defendant the newspaper plant or its management, but points to certain items of evidence as tending to prove that the Zellerbach Paper Company and the receiver "understood that title was transferred" upon the making of that order.

[8, 9] Passing the point that evidence of the circumstances under which a contract is entered into, or as to the contemporaneous construction placed upon it by the parties is admissible only when the contract is ambiguous—which we have seen is not the case here—the appellant directs attention to the following circumstances disclosed by the record: That the appointment of William H. Marsh as receiver in the proceeding in the state court was at the suggestion of Zellerbach Paper Company; that upon the appointment by the United States District Court of George M. Naus as receiver he retained Marsh in his employ as manager of the newspaper; that the salaries of the employees of the paper were paid by Naus only up to March 7; that their salaries were thereafter paid from an account known as "A. A. Axelrod and J. C. McCrary, dba Japanese American News"; that Axelrod was an attorney in the employ of Philip S. Ehrlich, attorney and general counsel for the paper company, and McCrary was an employee of that company; that neither of these two individuals had any proprietary interest in the paper; that the paper company, upon receipt of the bill of sale from the receiver, executed to them a bill of sale of the same property and assets, and they subsequently and without consideration therefor transferred those assets to a corporation organized by the paper company; that the paper company, upon receiving from the receiver the check for the balance of money in his hands on March 28, 1932, as part of the assets purchased by it from the bankrupt estate, indorsed the check to McCrary and Axelrod; that funds collected by Marsh after March 15, when the receiver refused to sign checks for any expenses accruing after March 7, were placed by him in a bank account opened in the name of "Japanese American News, William H. Marsh, Trustee," and subsequently, after McCrary and Axelrod received their bill of sale, the balance in said account was, on the advice of Ehrlich, transferred to the McCrary-Axelrod account, and that it was from this account that wages and salaries for services rendered the paper subsequent to March 7 were paid; that during the period following March 7 Marsh, managing and conducting the operations of the paper, had conversations with Ehrlich with respect to the operation and control of the paper, the details or substance of the conversations, however, not appearing; and that the method of handling the funds of the paper pending the organization of a corporation to take it over and operate it was evolved by Ehrlich and Axelrod.

Viewing these items of testimony in the light of such other parts of the record as are not contradicted, it is clear that before acquiring the Japanese American News from the bankrupt estate the defendant paper company had determined to cause a corporation to be formed for the purpose of taking it over and conducting it, and that it arranged with McCrary and Axelrod to hold and operate the paper during the interval of time between its acquisition and such formation, and that these, in so doing, were its agents; that the payment by these agents of expenses incurred in conducting the newspaper after March 7 and remaining unpaid at the time of the transfer of the assets of the bankrupt estate, was made from funds received from the receiver ($1,721.60) under the terms of the sale, to which was added amounts collected by Marsh, the business manager of the paper, after the receiver's refusal on March 15 to sign the pay-roll checks, and was in consonance with the terms of sale and an understanding arrived at between the attorneys for the receiver and the paper company in order to facilitate the closing of the transaction; that it made no difference to the paper company whether it, through its agents, paid these particular expenses, since they were paid out of funds received from the receiver and from Marsh collected by him before the transfer of the property to it, which funds, had these expenses been paid by the receiver, would have been correspondingly diminished; that the drawing by Marsh of the pay-roll checks on March 15 and their presentation to the receiver for signature was in the course of his duties as manager for the receiver, and that the refusal of the latter to sign those checks occurred after the publication of three out of four of the libelous articles and was the first intimation given by the receiver that he considered that title to the assets of the bankrupt to have passed to the paper company, and that such refusal was self-serving in character.

There is surely nothing in any of these circumstances nor in all combined to warrant an inference therefrom that the receiver, acting as the officer of the court, or the paper company intended—even if evidence of intention were admissible in evidence—that title should pass on March 7, the date of the confirmation of sale.

For the purpose of proving that title from the receiver to the paper company did in fact pass upon such confirmation the plaintiff offered in evidence an order made by the United States District Court in the matter of the bankrupt estate some seven months after the sale. It is entitled "Order allowing second account of receiver and enjoining prosecution of suit," and is dated October 24, 1932.

The occasion for the making of the order was that the present action had originally been brought against George M. Naus, as receiver of the bankrupt estate, and in the course of the proceedings in bankruptcy Naus petitioned the District Court for an order enjoining the prosecution of the suit. The record contains no evidence that any notice of the proceedings was given to any of the defendants, although there is a recital in the order that "due notice of the hearing of said account and of the application of the receiver and of counsel for compensation" had been given to the creditors by mail.

The admission in evidence of the order was objected to as irrelevant, incompetent, and immaterial, not binding on the defendants, and upon several other grounds. The purpose of the offer, as stated by the attorneys for the plaintiff, was to prove transfer of title of the newspaper on March 7, 1932, and that it was offered under the provisions of subdivision 1 of section 1908 of the Code of Civil Procedure.

The pertinent part of that section reads: "Effect of a judgment upon rights in various cases. * * * 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

The order, among other things, contained the following language: "That the bankrupt estate and the said receiver in bankruptcy were not the owners of the said newspaper after March 7, 1932, and that the said newspaper was not operated or published by the said bankrupt estate or the said receiver in bankruptcy after March 7, 1932, and the said receiver did not conduct the bankrupt's business after March 7, 1932."

In arguing that the said order was admissible plaintiff's attorneys contended that the finding is of a legal condition or relation as designated in the above-quoted subsection.

[10] In the first place, there being, as we have already pointed out, no ambiguity in the contract of sale as evidenced by the written offer and acceptance, the order was not admissible to show the intention of the parties on the question when title to the property passed.

[11-13] In the second place, it seems very obvious that the order was not an adjudication in rem. It was not an adjudication of a personal, political or legal condition or relation. Naus, it is conceded, was receiver in bankruptcy for the estate both before and after March 7, 1932, and was such when this particular order was made. The issue before the District Court was not the status of Naus or his relation to the bankrupt estate. The issue was whether at a particular date certain property formed part of its assets, and the determination of this question one way or the other would not affect the status of the receiver or his relation to the estate. He was receiver for the entire estate or he was not receiver at all. The adjudication was merely that after a given date certain personal property no longer formed part of the assets of the bankrupt. It was, of course, conclusive "between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding." Code Civ.Proc. § 1908, subd. 2. But here, as we have seen, the title of Zellerbach Paper Company was acquired before the commencement of the proceeding by the receiver to enjoin prosecution of the suit for libel in the state court. If this contention of the appellant were valid, it would follow that if the executor of an estate, for example, should prosecute a suit to quiet title to its real estate against a particular individual the judgment therein would bind all the world instead of only those persons coming within the terms of subdivision 2 of said Code section, and this simply because the plaintiff in the suit was the executor of an estate. It must be manifest that subdivision 1 of the section refers to the status or relationship in itself or in its entirety, and

not to any action taken by the person occupying the status or relation. On this question we quote from 2 Freeman on Judgments, § 900, p. 1894: "Any proceeding which is designed or the primary purpose of which is to establish status is to that extent a proceeding in rem and the judgment or decree, if upon the merits, is as conclusive as any other judgment in rem. But where the action or proceeding is such that a particular status, though directly in issue is only incidentally involved, or, in other words, is merely one of the facts the determination of which is essential to the adjudication of the principal subject-matter of the litigation, the resulting judgment is res judicata as to that status only as a judgment in personam, subject to all the limitations governing the operation of such judgments as res judicata, and, if conclusive, binds only the parties and privies or other persons who may be concluded by such an adjudication."

[14] There is another reason, as pointed out in respondents' brief, why the order was not admissible, which is, that that part of it enjoining the prosecution of the suit in the state court (the only portion of the order with which we are here concerned) was void for lack of authority on the part of the District Court to make it, the action being one for a tort charged against the receiver. Gableman v. Peoria, etc., R. Co., 179 U.S. 335, 338, 21 S.Ct. 171, 45 L.Ed. 220; Smith v. Jones Lumber & Mercantile Co., D.C., 200 F. 647, 650. This order being, first void, and second not binding on the defendants, could add no probative force to the other evidence introduced by the plaintiff hereinbefore reviewed.

While, perhaps, adding nothing to what has been said, we may observe that the trial court in admitting this order stated that in its opinion it was not binding on defendants, but nevertheless admitted it "for what it is worth."

[15] What we have said hitherto bears more particularly upon the question of the ownership of the Japanese American News on the dates when the libelous articles were published. This question does not affect the liability sought to be imposed upon defendant Marsh since he admittedly was business manager of the newspaper at the time of such publication, so that liability on his part, if any, must be predicated upon his own direct participation therein.

There is no testimony in the record as to this defendant's duties; the testimony is confined to the bare fact that he was business manager. It is not shown that his authority included any control over the editorial staff; and the word "business" being prefixed to "manager" would indicate that it did not. The most that may be said as to his participation in the publication of the alleged libel is that he was directly concerned in the distribution of the newspaper.

[16] The newspaper, we have seen, was printed and published in the Japanese language, which, it is conceded, Marsh did not understand. It was also testified and not disputed that he had no knowledge of the preparation or contents of the articles until after publication. Under these circumstances it would seem that the rule stated in 37 Corpus Juris, Libel and Slander, § 307, p. 15, would be applicable, namely, "It is a good defense for the vendor or distributor of a newspaper or periodical to show that he had no knowledge of the libelous matter, and that there were no extraneous facts which should have put him on his guard."

It results from what we have said that the record discloses no substantial legal evidence sufficient to support a judgment in favor of the plaintiff, for which reason there was no error on the part of the trial court in rendering judgment for the defendants notwithstanding the verdict.

The judgment is affirmed.

29 Cal.App.2d Supp. 766

PEOPLE v. BARKER.

No. Cr. A 1479.

Appellate Department, Superior Court, Los Angeles County, California.

March 8, 1938.

1. Workmen's compensation ⚷2080

The duty of employer to secure payment of workmen's compensation arises as soon as he becomes such and continues while that status exists, and if he fails to perform that duty either when he first becomes an employer or at any time thereafter, while such status continues, he is guilty of a misdemeanor regardless of occurrence of injury to any employee or the making of an award therefor. St.1929, p. 306, § 7; St.1933, p. 975, § 29(a, c, d).

2. Workmen's compensation ⚷2081

In prosecution for failure to secure payment of workmen's compensation, Industrial Accident Commission's award containing finding that person injured was in employ of accused and that accused was willfully uninsured at time of injury was inadmissible either as conclusive upon accused or as prima facie evidence against him regarding his status as an employer. St.1929, p. 306, § 7; St.1933, p. 975, § 29(a, c, d).

3. Workmen's compensation ⚷1079

In making workmen's compensation awards, Industrial Accident Commission exercises judicial functions and is to all intents and purposes a "court." St.1933, p. 975, § 29.

[Ed. Note.—For other definitions of "Court (Of Justice)," see Words & Phrases.]

4. Workmen's compensation ⚷1164

The proceeding before Industrial Accident Commission is civil in its nature and is in substance and effect, though not in form, a "civil action," within statute defining "civil action" as one prosecuted by party against another for declaration, enforcement, or protection of a right, or the redress, or prevention of a wrong, parties to proceeding being the employee or other person entitled to receive compensation, and the employer for whom may be substituted his insurance carrier. St.1933, p. 975, § 29; Code Civ.Proc. § 30, as amended by St.1933, p. 1805.

[Ed. Note.—For other definitions of "Civil Action—Case—Suit—etc.," see Words & Phrases.]

5. Workmen's compensation ⚷1165, 1339 1413

The rules of evidence and burden of proof in a proceeding before Industrial Accident Commission are not those which prevail in criminal prosecution, and the rule of reasonable doubt does not apply to such proceeding. St.1933, p. 975, § 29.

6. Judgment ⚷648

A judgment in a civil action is inadmissible in subsequent criminal prosecution although same questions are in dispute in both cases, since parties are not the same and different rules as to weight of evidence prevail.

7. Workmen's compensation ⚷1790

Provisions of Workmen's Compensation Act that all awards of Industrial Accident Commission shall be conclusively presumed to be lawful, and that only Supreme Court and District Courts of Appeal to certain extent shall have jurisdiction to review such awards, do not give to awards of commission the character of judgments in rem, binding upon the world so as to render an award which has not been modified or set aside by the court, admissible in criminal prosecution against alleged employer for failure to secure payment of workmen's compensation. St.1917, p. 868, § 55(b); p. 875, § 67(c, d); St.1933, p. 975, § 29(a, c, d).

8. Workmen's compensation ⚷2081

In prosecution against alleged employer for failure to secure payment of workmen's compensation, employer has burden of showing that he has secured payment of compensation in one of the two ways permitted by statute. St.1933, p. 975, § 29(a, c, d).

◆

Appeal from Municipal Court of Los Angeles; Clement D. Nye, Judge.

Ralph G. Barker was in the municipal court convicted of violating the Workmen's Compensation Insurance and Safety Act, and he appeals.

Reversed and remanded for new trial.

Samuel S. Adler, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and John L. Bland, Deputy City Atty., both of Los Angeles, for the People.

Everett A. Corten, Atty. for Industrial Accident Commission, and Eldon B. Spofford, Asst. Atty., both of San Francisco, amici curiæ.

SHAW, Presiding Judge.

Defendant appeals from a judgment of conviction rendered against him on a charge of violating section 29 of the Workmen's Compensation Insurance and Safety Act of 1917, St.1917, pp. 831, 857, as amended by St.1933, p. 975, Act 4749, Deering's Gen.Laws, 1931, p. 2272, 2298, as amended, Deering's Supp., 1933, pp. 1831, 1834. This act provides for a complete system of workmen's compensation covering industrial accidents, liability of the employer for which is entirely independent of negligence, creates a tribunal known as the Industrial Accident Commission to pass on and determine all claims for such compensation, and provides that an employer may protect himself against such liability, by insurance. In 1937 this act was repealed, but its provisions were re-enacted and incorporated, without substantial change, into the Labor Code, St. 1937, pp. 185–329. Since this Code took effect after the date of the offense charged and after the commencement of this prosecution, we quote from the provisions of the former statute. The Code contains provisions safeguarding pending proceedings and no point is made of this repeal, so we assume that it does not affect this case.

Section 29 of the act above referred to contains these provisions which are pertinent here:

"(a) Every employer as defined in section 7 hereof, except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

"1. By insuring and keeping insured against liability to pay compensation in one or more insurance carriers duly authorized to write compensation insurance in this State.

"2. By securing from the commission a certificate of consent to self-insure * * [the foregoing now in section 3700, Labor Code]. * * *

"(c) Failure to secure the payment of compensation as hereinbefore provided shall constitute a misdemeanor [now section 3710, Labor Code]. * * * In case of the wilful failure by an employer to secure the payment of compensation as herein provided, the amount of compensation otherwise recoverable for injury or death as provided in this act shall be increased ten per cent [now in section 4554, Labor Code]. * * *

"(d) * * * In any prosecution under this section, the burden of proof shall be upon the defendant to show that he has secured the payment of compensation in one of the two ways set forth in paragraph (a) hereof." Now in section 3711, Labor Code.

At the trial John Curtis Reid testified that he was in the employ of the defendant, that in the course of his employment he sustained injuries, on the date stated in the complaint as that of the commission of the offense charged, and that the Industrial Accident Commission had made an award to him against the defendant for said injuries, but nothing had been paid to him on account of said award. A copy of this award was introduced in evidence, without objection by the defendant. The award contains findings that Reid was in the employ of defendant and was injured in the course of his employment, and that "The defendant was wilfully uninsured at the time of said injury and any compensation normally recoverable is increased ten per cent (10%) by such wilful uninsurance." No other evidence was given at the trial, tending to show that defendant was at any time an employer. Defendant testified that Reid was not in his employ at the time in question, but this testimony was stricken out by the trial court on the ground that the finding made on this fact in the award of the Industrial Accident Commission was conclusive upon him. The defendant now challenges the correctness of this ruling.

[1] The evidence offered in proof of the charge indicates some confusion of thought on the part of the prosecution regarding the nature of the offense defined by the penal provision above quoted from section 29 of the statute. That offense is not the failure of an employer against whom an award has been made under the statute to pay the award or to provide security for its payment. The act denounced is "failure to secure the payment of compensation as hereinbefore provided." The previous provision thus referred to requires "every employer as defined in section 7 hereof" to secure the payment of compensation. Section 7, St.1917, p. 835, as amended by statutes of 1929, p. 306, now section 3300, Labor Code, provides that: "The term 'employer,' as used in sections 6 to 31, inclusive, of this act, shall be construed to mean: * * * Every person, firm, voluntary association, and private corporation, including any public service corporation, who has any person in service under any appointment or contract of hire, or apprenticeship, express or

implied, oral or written, and the legal representative of any deceased employer." By other provisions of the act, which we need not quote, certain classes of persons in service are excluded from consideration in determining who is an employer. Under the provisions of sections 7 and 29 above referred to, the duty of an employer to secure the payment of compensation arises as soon as he becomes such and continues while that status exists, and if he fails to perform that duty, either when he first becomes an employer, or at any time thereafter while such status continues, he is guilty of a misdemeanor, entirely regardless of the occurrence of injury to any employee or the making of an award therefor.

[2] Since the only evidence offered in support of the charge, regarding defendant's status as an employer, attributed that status to him by reason of his employment of Reid, he was entitled to dispute the allegation by showing that Reid was not his employee, unless the trial court was right in ruling that the award of the Industrial Accident Commission was conclusive on him. Both the prosecutor and the amicus curiæ appearing in behalf of the Industrial Accident Commission now concede that the award is not conclusive and the court erred in excluding evidence to contradict it, but the amicus curiæ contends that the award is admissible as prima facie evidence of the facts stated therein. In strictness the latter point does not directly arise on this appeal, for defendant did not object to the reception of the award in evidence; but since on the new trial which is necessary the question may arise, we express our views regarding it. We are of the opinion that the award is not admissible in this criminal prosecution, either as conclusive upon the defendant or as prima facie evidence against him.

[3-5] In making awards of compensation under the act, the Industrial Accident Commission exercises judicial functions, and is, to all intents and purposes, a court. Pacific Coast Casualty Co. v. Pillsbury, 1915, 171 Cal. 319, 322, 153 P. 24; Western Metal Supply Co. v. Pillsbury, 1916, 172 Cal. 407, 411, 156 P. 491, Ann.Cas.1917E, 390; Carstens v. Pillsbury, 1916, 172 Cal. 572, 576, 158 P. 218. The proceeding before the commission leading up to an award is civil in its nature and is in substance and effect, though not in form, a "civil action," which, as defined in section 30 of the Code of Civil Procedure, as amended by St.1933, p. 1805, is an action "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." The parties to such a proceeding are the employee or other person entitled to receive compensation, on the one side, and the employer, for whom may be substituted his insurance carrier, on the other. The rules of evidence and burden of proof in such a proceeding are not those which prevail in a criminal prosecution. The rule of reasonable doubt does not apply to proceedings before the commission. It may take testimony in the absence of the parties, and may receive in evidence unsworn reports on various matters, most of which, however, could not be involved in this criminal prosecution (section 19 of the Act, St.1917, p. 848, now sections 5701 and 5703, Labor Code), and it is not "bound by the common law or statutory rules of evidence and procedure." Section 60 of the Act, St.1917, p. 871, as amended by St.1933, p. 2246, now section 5708, Labor Code.

[6] "A judgment in a civil action is not admissible in a subsequent criminal prosecution, although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail." 15 R.C.L. 1004; to the same effect, 34 Corpus Juris 972; 2 Freeman on Judgments, 5th Ed., p. 1388, § 658. This rule has been followed in California in People v. Fink, 1931, 118 Cal.App. 631, 634, 5 P.2d 641, where it was put upon the ground that the parties are not the same. The rule has found general acceptance elsewhere. In State v. Weil, 1909, 83 S.C. 478, 65 S.E. 634, 635, 26 L.R.A.,N.S., 461, 463, the court stated it as follows: "The general rule is that a judgment in a civil action cannot be given in evidence in a criminal action to establish the facts on which it was rendered," and after stating that the civil judgment in question there was obtained on ex parte affidavits and failure of defendant to appear, said further: "If such a judgment should be held as the basis of res judicata or estoppel in a subsequent criminal prosecution, the practical effect would be to annul the rule that in criminal prosecutions the state must establish the defendant's guilt beyond a reasonable doubt." In a note to this case at 26 L.R.A.,N.S., 461, a number of decisions are cited in support of the rule stated in the case. Among the cases declaring this rule are Britton v. State, 1884, 77 Ala. 202, 209; Ireland v.

State, 1911, 99 Ark. 32, 136 S.W. 947, 952; State v. Bradnack, 1897, 69 Conn. 212, 37 A. 492, 493; 43 L.R.A. 620, 621; Wilcox v. State, 1911, 8 Ga.App. 536, 69 S.E. 1086; State v. Wenz, 1889, 41 Minn. 196, 42 N.W. 933, 934; State v. Ruthkowski, 1930, 180 Minn. 378, 230 N.W. 818; State v. Dula, 1933, 204 N.C. 535, 168 S.E. 836. The same rule has been applied even where the parties were the same in both the civil and the criminal case. Busby v. State, 1907, 51 Tex. Cr.R. 289, 307, 103 S.W. 638, 649, opinion on rehearing; Riker v. Hooper, 1862, 35 Vt. 457, 462, 82 Am.Dec. 646.

[7] Certain provisions of the act above mentioned are cited to us as establishing a different rule for this case, but we think none of them has such effect. One of these is section 55, subdiv. (b), St.1917, p. 868, now section 5302, Labor Code, reading as follows: "All orders, rules and regulations, findings, decisions and awards of the commission shall be in force and shall be prima facie lawful; and all such orders, rules and regulations, findings, decisions and awards shall be conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts in this act specified and within the time and in the manner herein specified." Other provisions cited in this connection are the following parts of section 67, St.1917, p. 875: "(c) The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission." Now in section 5953, Labor Code. "(d) * * * No court of this state, except the supreme court and the district courts of appeal to the extent herein specified, shall have jurisdiction to review, reverse, correct or annul any order, rule, regulation, decision or award of the commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin or interfere with the commission in the performance of its duties." Now in section 5955, Labor Code.

It does not appear that the award here has been modified or set aside by the courts, so these provisions, if applicable at all to the present case, would make the award conclusive on the defendant as to the facts of employment and non-insurance; something which counsel making the argument concedes cannot be done. The correctness of this concession is established by Manley v. Georgia, 1929, 279 U.S. 1, 6, 49 S.Ct. 215, 217, 73 L.Ed. 575, 578, and Western & A. R. v. Henderson, 1929, 279 U.S. 639, 642, 49 S.Ct. 445, 447, 73 L.Ed. 884. We are satisfied that none of the provisions above quoted are intended to deal with the question of the reception of an award as evidence in another action or proceeding. Section 67 provides the details of a plan by which review of the awards of the commission by certain courts may be obtained. The portions of that section quoted are parts of that plan and their purpose is merely to limit the review to the courts specified and to restrict the extent of the review to be had even in those courts. The part of section 55 quoted is directed in part to the same object, but it is broader in scope, and its general effect and purpose appear to be to create for the decisions of the commission a conclusive character similar to that of judgments of the courts in civil actions.

None of these provisions gives to the decisions of the commission the character of judgments in rem, binding upon the world. Williams v. So. Pac. Co., 1921, 54 Cal.App. 571, 583, 202 P. 356. They all appear, in substantially the same language, in a former act on the same subject, and as there appearing were all considered in Thaxter v. Finn, 1918, 178 Cal. 270, 273, 274, 275, 173 P. 163, 165. In that case the court quoted and approved the following statement of counsel for the commission: "It is as plain and clear as anything can be made that the statutory specifications for attack upon the awards of the commission were intended to provide the only method of attack, and to preclude any collateral attack which would, or could, be directed to defeating the award itself, *so far as the rights of the immediate parties to the controversy are concerned.*" (Italics ours.) The defendant here did not attempt to attack or defeat the *award*, or to disturb or affect the rights of Reid to the compensation awarded him thereby, or the liability of defendant to pay such compensation, or to raise any question about it as between him and Reid, who was, of course, not a party to the criminal prosecution. The defendant merely sought to defend himself on a criminal charge by showing that he was not an employer. The provisions of the statute relied on here are not applicable to such a situation.

[8] At the trial no proof was made that defendant had not secured the payment of

compensation, except as and if the finding of the commission that defendant was "uninsured" at the time of the injury to Reid may be regarded as such proof. Upon another trial this finding will doubtless be excluded from evidence, and the question will necessarily arise, on whom is the burden of producing evidence in regard to this matter? Subdivision (d) of section 29 of the statute provides: "In any prosecution under this section, the burden of proof shal' be upon the defendant to show that he has secured the payment of compensation in one of the two ways set forth in paragraph (a) hereof." Now in section 3711, Labor Code. The allegation that the defendant has not secured the payment of compensation, etc., is a negative allegation and relates to a matter peculiarly within the knowledge of the defendant. If required to prove it the prosecution must resort to the records of the Industrial Accident Commission and also to all the insurance carriers authorized to write compensation insurance in this state, whose records from which the matter can be determined may be remote from the venue of the offense, while the defendant may disprove it, if it is untrue, merely by producing his policy or the order of the commission. In such a case it is proper to put the burden on the defendant. "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." Casey v. U. S., 1928, 276 U.S. 413, 418, 48 S.Ct. 373, 374, 72 L.Ed. 632. To same effect, see Yee Hem v. U. S., 1925, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904. This rule was also recognized in Morrison v. California, 1934, 291 U.S. 82, 90, 91, 54 S.Ct. 281, 285, 78 L. Ed. 664, where the court said: "For a transfer of the burden, * * * there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge." Casey v. U. S., supra, and Yee Hem v. U. S., supra, were cited and followed in People v. Osaki, 1930, 209 Cal. 169, 194, 286 P. 1025. The statute here merely embodies the rule that would have been applied to the case in the absence of any statute. People v. McClain, 1934, 2 Cal.App. Supp.2d 751, 758, 33 P.2d 710.

The judgment is reversed and the cause is remanded to the municipal court for a new trial.

We concur: BISHOP, J; SCHAUER, J.

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29 Cal.App.2d Supp. 775

PEOPLE v. FAWVER.

C.A. 1483.

Trial Court No. 6555.

Appellate Department, Superior Court, Los Angeles County, California.

March 10, 1938.

1. False pretenses ⚿49(3)

Where material false pretense was alleged, the statement of defendant that he had made certain fittings and could deliver them, which statement was untrue, and pretense was not in writing or accompanied by any false token or writing, nor was there any written note or memorandum thereof, conviction for petty theft on the sole testimony of the complaining witness could not be sustained. Pen.Code, §§ 484, 1110.

2. False pretenses ⚿2

The amendment of the section of Penal Code by which the offense of obtaining money by false pretenses was included in the definition of theft did not repeal by implication the section of Penal Code requiring, to sustain a conviction for obtaining money or property by false pretenses, the corroboration of testimony of the complaining witness, or make it inapplicable to a false pretense case prosecuted as one of theft. Pen.Code, §§ 484, 1110.

3. Larceny ⚿55

In prosecution for larceny by fraud, trick, or device which is included in statutory definition of theft, statute requiring corroboration of complaining witness in false pretense prosecution is not applicable. Pen. Code, §§ 484, 1110.

4. False pretenses ⚿20

Whether an offense is larceny or the obtaining of money under false pretenses depends upon the question of fact whether the victim intended to part with title to the money to the person taking it which constitutes crime of "obtaining money by false pretenses," and if there is no intention to pass title, the crime is "larceny." Pen.Code, § 484.

[Ed. Note.—For other definitions of "Larceny" and "Obtaining Money or Property on Credit on Materially False Statement," see Words & Phrases.]

5. False pretenses ⚿20

If an owner of title to property or money at time possession is delivered to defendant retains an interest in the money or property or intends to pass title at a time later than delivery, there may be a "larceny," and not crime of "obtaining money under false pretenses," since passing of complete title is necessary to complete the latter offense. Pen.Code, § 484.

◆

Appeal from Justice's Court, San Gabriel Township; C. E. Christopher, Judge.

Frank W. Fawver was convicted of petty theft in a justice court of San Gabriel township, and he appeals.

Reversed and remanded.

Geo. B. Hancock, of Huntington Park, for appellant.

Buron Fitts, Dist. Atty., of Los Angeles, for the People.

SHAW, Presiding Judge.

The conviction of petty theft here can be sustained, if at all, only on the evidence tending to prove these facts: That the defendant stated to Tinkle, the complaining witness, who was a plumber, that defendant had built the molds for and had manufactured certain plumbers' fittings which defendant offered to sell to Tinkle; that Tinkle on a Saturday gave defendant an order for some of them, which defendant said he could and would deliver on the following Monday; that defendant asked Tinkle on Saturday to give him $25 "in advance, as payment on these fittings," which Tinkle then did; that no fittings were ever delivered to Tinkle and none had in fact been manufactured by defendant; nor had he built the molds for them. It also appears that defendant had previously asked Tinkle to finance him in making the molds for these fittings by a loan, which Tinkle had refused to do, and that still earlier Tinkle had loaned defendant money for making other molds, which defendant had not repaid.

[1, 2] These facts are sufficient to prove a theft as defined in section 484 of the Penal Code, of the sort formerly known as obtaining money by false pretenses. The material false pretense here is the statement that defendant had made the fittings and could deliver them. This pretense was not in writing or accompanied by any false token or writing, nor was there any written note or memorandum thereof. The only testimony of its making is that of Tinkle. Under the circumstances, section 1110 of the Penal Code requires for conviction corroboration of his testimony in that respect by that of another witness or by circumstances, and neither appears here. The amendment of section 484 of the Penal Code, St.1927, p. 1046, by which the offense of obtaining money by false pretenses was included in the definition of theft, did not repeal section 1110 by implication or make it inapplicable to a false pretense case prosecuted as one of theft. People v. Carter, 1933, 131 Cal.App. 177, 183, 21 P.2d 129; People v. Edwards, 1933, 133 Cal.App. 335, 339, 24 P.2d 183; People v. Curran, 1938, Cal.App., 75 P.2d 1090.

[3, 4] Since the crime of larceny by fraud, trick, or device is also included in the statutory definition of theft and in the charge here, and section 1110 of the Penal Code would not apply thereto, People v. Edwards, supra, 133 Cal.App. 335, at page 341, 24 P.2d 183, we have considered whether out of the facts in this case such an offense can be constructed. We conclude that it cannot. The evidence in support of the judgment discloses at most only a plain case of lying, unaccompanied by any trick, stratagem, or device.

In a case which has been often cited, the Supreme Court said: "The distinction between larceny and false pretenses sometimes depends on a close analysis of facts and legal principles. It is stated in Harris on Crim.Law (3d Ed.) p. 194: 'The most intelligible distinction between false pretenses and larceny has been thus set forth: "In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it*, although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud."' (The italics are our own.) * * * These authors are here speaking of the intention of the owner with respect to the relation which the person then receiving the goods shall bear to them; that is, the owner's intention as to the effect which the delivery of the possession to the defendant shall have on the title. If such delivery is intended to transfer the title absolutely, there is no larceny." People v. Delbos, 1905, 146 Cal. 734, 736, 81 P. 131. In this case the charge was larceny only, and there was evidence that the complaining witness had given money to the defendant to be used by defendant in buying a lodging house for the complaining witness from a third person, and that the defendant obtained this money on a false pretense and with the intention of appropriating it to her own use; on which the court held that a case of larceny appeared. But the court also held that the trial court erred in rejecting defendant's offer of evidence to show that in fact the complaining witness was buying the lodging house from defendant and the money was delivered to defendant in part payment therefor, and for such error reversed the judgment, saying in that connection, "if the defendant had herself some property interest in the goods sold, and had, by means of criminally false and fraudulent pretenses, made the sale of that interest to Mrs. Marquet [complaining witness] for an extravagant price, and thereupon Mrs. Marquet had delivered the money to Mrs. Delbos [defendant], not to be carried to the original seller, Mr. Stalford, but to pay upon the price of the sale direct from the defendant to Mrs. Marquet, the crime might have been that of obtaining money by false pretenses, but it would not have constituted larceny, because in that case there would have been an intention on the part of Mrs. Marquet to transfer the title to her money directly to the defendant." 146 Cal. 734, at page 737, 81 P. 131, 132.

In People v. Shearer, 1927, 83 Cal.App. 321, 331, 332, 256 P. 611, 615, the information charged the obtaining of money by a false pretense that the defendant had for sale and could sell a certain cleaning plant. The evidence showed such a false pretense, and that in reliance on it the complaining witness paid money to the defendant, which said witness "regarded * * * as money paid for a purchase thereby effected," although it was understood that certain papers were yet to be signed to complete the transaction. The defendant contended that on the facts the crime, if any, was larceny. The court stated the rule that, "If the owner intended to part with possession merely, and not to transfer title as well, the crime is larceny; but, if title is intended to pass at the time, then the offense is that of obtaining money or property by false pretenses," and held that the crime proved was properly charged.

In People v. Leach, 1930, 106 Cal.App. 442, 463, 290 P. 131, 140, where the complaining witness was induced to exchange certain stock for mortgage notes by representations as to the value and character of the property covered by the mortgages securing the notes, the court said: "We are satisfied that, if there was a theft, it was by false pretenses and not by trick and device. The evidence shows clearly that Mrs. Wiseman intended at the time of transfer to part with both possession and title absolutely and not for a special purpose, such as to place upon a particular horse in a horse race, to be used as a bribe or similar purposes commonly found in cases of larceny by trick and device. The intent to part absolutely and unconditionally with both possession and title prevents the transaction from being larceny by trick or device." Section 1110 of the Penal Code was held applicable to the case.

There are many other cases declaring in substance the rule which the court succinctly stated in People v. DeGraaff, 1900, 127 Cal. 676, 679, 60 P. 429, 430, as follows: "Whether the offense was larceny, or the obtaining money under false pretenses, depended upon the question of fact,—whether Mrs. Healy [the victim] intended to part with the title to the money." See People v. Raschke, 1887, 73 Cal. 378, 381, 15 P. 13; People v. Tomlinson, 1894, 102 Cal. 19, 23, 36 P. 506; People v. Campbell, 1899, 127 Cal. 278, 281, 59 P. 593; People v. Proctor, 1905, 1 Cal.App. 521, 523, 82 P. 551; People v. Arnold, 1911, 17 Cal.App. 68, 73, 118 P. 729; People v. Miles, 1912, 19 Cal.App. 223, 226, 125 P. 250; People v. Shwartz, 1919, 43 Cal.App. 696, 699, 185 P. 686; People v. White, 1924, 66 Cal.App. 703, 706, 226 P. 962; People v. Edwards, 1925, 72 Cal.App. 102, 113, 236 P. 944; People v. Peppa, 1926, 76 Cal.App. 310, 313, 244 P. 627; People v. Robinson, 1930, 107 Cal.App. 211, 220, 290 P. 470; People v. White, 1932, 124 Cal.App. 548, 553, 12 P.2d 1078; People v. Edwards, 1933, 133 Cal.App. 335, 340, 24 P.2d 183; People v. Woolsey, 1936, 13 Cal.App.2d 54, 58, 56 P.2d 557; People v. Curran, 1938, Cal. App., 75 P.2d 1090.

[5] As is stated in some of the cases above cited, the rule of law regarding the distinction between the two offenses under discussion is clear, but its application to the facts is often difficult. All of these cases adhere to the rule stated. The passing of title referred to in the rule is the complete title to the property; although the defendant obtains at the time possession is delivered to him some special interest or right in money or other property de-

livered, yet, if the victim retains an interest therein, there may be a larceny. Also, if the victim intends title to pass at some time later than the delivery, or upon the fulfillment of some condition not then performed, there may be a larceny. A still more common case is that the victim delivers money or property to the defendant as a loan to enable him to carry out some special plan, or upon some trust, or for some special purpose, as to invest it, or to buy property with it. In all these cases the title does not pass to defendant on delivery to him, and if he then takes what is delivered to him with the intention of appropriating it to his own use, there is a larceny. But this case presents no such facts. Here the money was delivered to defendant, according to the record, "in advance, as payment on these fittings." Tinkle had refused to make a loan to defendant or to finance him in the making of molds for these fittings, but on being told that defendant had made the fittings he bought some and paid a part of the price in advance. There was no loan; no plan or purpose in the mind of Tinkle to which he expected the money to be applied. A payment passes to the payee a present and complete title to the property given in payment. See 48 Corpus Juris 631. If the consideration for which a payment is made is not forthcoming, the payor may rescind and recover what he paid, but that possibility does not alter the original effect of the payment as a transfer of title. The facts here are substantially the same as those which the Supreme Court in People v. Delbos, 1905, 146 Cal. 734, 737, 738, 81 P. 131, supra, held the defendant should have been allowed to show as rebutting the charge of larceny. They are also in essence the same as those discussed in People v. Shearer, 1927, 83 Cal.App. 321, 331, 332, 256 P. 611, supra, People v. Leach, 1930, 106 Cal.App. 442, 463, 290 P. 131, supra, and People v. Curran, 1938, Cal.App., 75 P.2d 1090, supra, and held in those cases to constitute, not larceny, but false pretenses.

We find nothing inconsistent with our conclusions in People v. Hennessey, 1927, 201 Cal. 568, 581, 582, 258 P. 49, or People v. Kirsch, 1928, 204 Cal. 599, 602, 269 P. 447. In the Hennessey Case the victims did not deliver the money unconditionally to the defendants; there was an understanding that it was to be used for a special purpose, and the Supreme Court had this fact in mind in rendering its decision, as appears from the following language used by it, 201 Cal. 568, at page 581, 258 P. 49, 54: "There can be but little doubt that the investors parted with the possession of their money influenced by the representations that it would be used by the defendants in promoting the enterprise to a conclusion in good faith. The money unlawfully obtained could not have been used for the purposes for which it was supposedly acquired, and as the investors believed it would be used for the reason that there was nothing upon which it could have been expended." In the Kirsch Case there was in fact no authorized delivery to defendant of the property he was convicted of stealing; he obtained it by tricking the employees of the owner into letting him have it and the delivery was made in violation of the contract between him and the owner regarding it. People v. Edwards, 1925, 72 Cal.App. 102, 113, 236 P. 944, supra, was plainly a case where the victim did not intend to pass title to the money, but delivered it to defendant that he might use it for the purpose of bribing certain officers. In People v. Miles, 1912, 19 Cal.App. 223, 228, 125 P. 250, the victim delivered her money to defendant to be invested in stock of a corporation not yet organized, and these facts, the court held, supported a finding that title to the money did not then vest in him, and hence he was properly convicted of larceny. People v. Arnold, 1912, 20 Cal.App. 35, 127 P. 1060, arose from the same transaction as the Miles Case, and merely followed it.

The judgment is reversed and the cause is remanded to the justice's court of San Gabriel township for a new trial.

BISHOP and SCHAUER, JJ., concur.

24 Cal.App.2d 479

BROWN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 11675.

Supreme Court of California.

March 21, 1938.

Appeal and error 🔑1074(3)

Where record contained judgment rolls of both first and second trials, certified as "full, true and correct" by the clerk, and where certificate of trial judge appended to the entire transcript certified that it was "true and correct," appealing defendant was not prejudiced by failure of the judge's certificate to certify that the transcript was "full, true and correct." Code Civ.Proc. § 652, as amended by St.1933, p. 1836; § 953.

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In Bank.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceedings on the petition for relief and writ of mandate by Herbert Cutler Brown against the Superior Court of the State of California, in and for Los Angeles County, and the Honorable Leslie E. Still, Judge of said court, wherein an order to show cause was issued to determine whether or not the respondent judge had properly certified to transcript on appeal. The District Court of Appeal, 75 P.2d 517, discharged the order to show cause. On petition for rehearing in the Supreme Court.

Petition denied.

Ferman E. Davis and Herbert Cutler Brown, both of Hollywood, for petitioner.

Carpenter, Babson & Fendler and Everett W. Mattoon, Co. Counsel, all of Los Angeles, for respondents.

PER CURIAM.

The petition for hearing is denied. The decision of the District Court of Appeal discharges the order to show cause theretofore issued by said court upon petitioner's application made under section 652, Code of Civil Procedure, as amended by St.1933, p. 1836. Said appellate court decision does not dismiss the appeal taken by petitioner from the orders of the superior court of Los Angeles county denying petitioner's motions to vacate the judgment entered against him.

The decision of the appellate court states that upon the hearing of petitioner's motions to vacate said judgment other evidence was presented by the plaintiff in addition to the judgment rolls contained in the transcript. Petitioner contends that this statement, taken by the appellate court from the response filed by respondent to the order to show cause, is incorrect.

The petitioner's contention is that the judgment entered against him is absolutely void on the judgment rolls of the first and second trials. The record presented contains the judgment roll of both the first and second trials, certified as "full, true and correct" by the clerk, who is the proper official to certify judgment rolls. Section 953, Code of Civil Procedure. In addition there is the certificate of the trial judge appended to the entire transcript that it is "true and correct." Petitioner is not prejudiced by the failure of the judge's certificate to certify that said transcript is "full, true and correct."

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24 Cal.App.2d 468

CULLINAN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 5974.

Supreme Court of California.

March 21, 1938.

1. States 🔑53

The state personnel board does not act in quasi-judicial capacity in passing on application for reinstatement of civil service employee.

2. Mandamus 🔑172

Superior court, which had jurisdiction to entertain proceeding in mandamus, had power to decide all questions properly presented to it in such proceeding.

3. Prohibition 🔑31

Attempted limitation on power of superior court to determine all questions properly presented in proceeding for mandamus wherein superior court had jurisdiction, by order of Court of Appeal denying writ of prohibition, was improper.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by William J. Cullinan for a writ of prohibition against the Superior Court in and for Sacramento County, and others. The petition was denied by the District Court of Appeal, 75 P.2d 518, and the petitioner filed a petition for hearing in the Supreme Court.

Petition for hearing denied.

Courtney L. Moore, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Everett A. Corten, and Eldon B. Spofford, both of San Francisco, for respondents.

PER CURIAM.

The petition for a hearing herein is denied.

[1-3] The District Court of Appeal properly denied the petition for the writ of prohibition. But the declaration in its opinion that the state personnel board acts in a quasi-judicial capacity in passing upon an application for reinstatement should be expressly disapproved. Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296. Also it seems necessary to state that since the superior court has jurisdiction to entertain the proceeding in mandamus pending before it, that court has the power to decide all questions properly presented to it in such a proceeding, and any limitation placed on that power in the opinion and order denying the writ of prohibition was inappropriate.

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11 Cal.2d 22

Ex parte MIZE.

Cr. 4145.

Supreme Court of California.

March 22, 1938.

1. Towns 🔑6

The board of supervisors of Los Angeles county has power to change the boundaries of judicial townships. Pol.Code, §§ 4015, 4041.10.

2. Criminal law 🔑90(4)

The population of a judicial township, the boundaries of which were changed after 1931 by the board of supervisors of Los Angeles county, would be determined by reference to the federal census of 1930. Code Civ.Proc. § 81, as added by St.1933, p. 1810, as amended by St.1933, p. 2476.

3. Criminal law 🔑90(3)

Under statutes, justice's court of Compton township, which exceeds population of 30,000, had jurisdiction to impose sentence of one year's imprisonment upon prisoner who failed to pay for support of his minor child. Pen.Code, § 270, and § 1425, as amended by St.1933, p. 1454; Code Civ.Proc. § 81, as added by St.1933, p. 1810, as amended by St.1933, p. 2476.

4. Criminal law 🔑881(1)

Where complaint charged that father willfully, unlawfully, and without lawful excuse failed to provide for minor child, and verdict as entered was "guilty as charged in the complaint," reference to the complaint constituted a finding that the failure to provide was willful and without lawful excuse. Pen.Code, § 270.

5. Criminal law 🔑260(7)

A verdict of the jury or finding of the court adjudging a defendant guilty is part of the record or judgment roll in criminal cases tried in a justice court. Pen.Code, § 1468, as amended by St.1935, p. 2146; Rules Adopted by the Judicial Town Council, rule 3.

6. Criminal law 🔑258(2)

That judgment of justice court imposing sentence contained no statement of the offense but merely recited that sentence was imposed on defendant did not entitle defendant to his release where it appeared from the record that he had been convicted of willful failure to provide for his minor child. Pen.Code, §§ 270, 1445, 1453; § 1449, as amended by St.1933, p. 1423; § 1468, as amended by St.1935, p. 2146.

7. Criminal law 🔑258(2)

The entry of judgment in a justice court should state the offense for which defendant has been convicted, since certified copy of the judgment as entered in the minutes constitutes commitment or warrant under which defendant is imprisoned. Pen.Code, § 1455.

8. Criminal law 🔑260(11)

Where the minute entry of a judgment of justice court did not itself recite that prisoner was convicted of failure to provide for minor child, but a statement thereof was made in preliminary recitals of the commitment, and certified by justice of the peace, prisoner was not prejudiced by the failure of the minute entry of judgment to recite the offense. Pen.Code, §§ 270, 1455.

9. Habeas corpus 🔑30(3)

Under statute providing that in criminal trials in superior court clerk in entering judgment must state briefly the offense for which conviction was had, which is not required in justice court, failure of judgment of justice court to do so would not entitle defendant to release on habeas corpus, since remedy would be to secure correction of the entry to state the offense of which he has been convicted. Pen.Code, § 1207, as amended by St.1935, p. 461; § 1453.

10. Criminal law 🔑996(1)

Under statute requiring that in criminal trials in superior court clerk in entering judgment must state briefly offense for which conviction was had, where clerk fails to do so, the record may be amended to speak the truth. Pen.Code, § 1207, as amended by St. 1935, p. 461.

11. Habeas corpus 🔑111(1)

Where valid conviction is had but judgment of imprisonment is void for reason that it was entered on a holiday, or exceeds that allowed by law, the prisoner will not be discharged on habeas corpus but will be held awaiting pronouncement and entry of a valid judgment.

12. Criminal law 🔑258(2)

Where complaint charged that accused willfully, unlawfully, and without lawful excuse failed to provide for minor child, finding of justice court that accused was guilty as charged in complaint entered in the minutes constituted an adjudication that offense was willful and without lawful excuse, and supported a judgment imposing a year's imprisonment. Pen.Code, § 270.

In Bank.

Proceedings in the matter of the application of Earl Kenneth Mize for a writ of habeas to secure his release from the sheriff of Los Angeles county.

Writ discharged and petitioner remanded.

Clarence P. Wallick, of Long Beach, for appellant.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SEAWELL, Justice.

This is a proceeding in habeas corpus to secure the release of Earl Kenneth Mize from the custody of the sheriff of Los Angeles county. Mize was convicted of failure to provide for his infant child (section 270, Pen.Code) in the justice's court of Compton township, Los Angeles county. He was placed on probation for two years on condition that he pay $15 a month for the support of said child. Upon his default in making said payments his probation was revoked, and said justice's court on May 20, 1937, sentenced him to one year's imprisonment in the county jail. The court directed that he should work during said term upon the public roads or other public works and that his pay, received from the board of supervisors at the rate of $1 a day, should be paid to the probation officer for the support of said child.

Petitioner contends that the justice's court of Compton township is without jurisdiction of violations of section 270, Pen. Code, for the reason that it is a class B justice's court. Class B justice's courts exist in townships having a population of less than 30,000. Section 81, Code Civ.Proc., as added by St.1933, p. 1810, as amended by St.1933, p. 2476. Such courts have jurisdiction in criminal cases amounting to a misdemeanor only, punishable by fine not exceeding $1,000, or imprisonment not exceeding six months, or by both such imprisonment and fine. Section 1425, Pen.Code, as amended by St. 1933, p. 1454. The offense of failure to provide for a minor child as defined in section 270, Penal Code, is subject to imprisonment in the county jail not exceeding two years or by a fine not exceeding $1,000, or by both. In the case herein, petitioner's term of imprisonment is one year.

Petitioner cites County of Los Angeles v. Justice's Court, 208 Cal. 429, 281 P. 611, decided in 1929, wherein it was held that the justice's court of Compton township was a class B justice's court. It appears from the showing made by respondent upon the return to the writ, however, that the present Compton township includes a larger area than the former Compton township, which was found in the case cited to have a population of less than 30,000.

[1] The complaint against petitioner was filed on July 2, 1936. On May 28, 1934, the board of supervisors of Los Angeles county enacted an ordinance redistricting judicial townships in the county, which became effective January 1, 1935. The power of a county board of supervisors to change the boundaries of judicial townships under section 4015, Pol.Code, has been recognized repeatedly. See, also, section 4041.10, Pol.Code; People v. Chaves, 122 Cal. 134, 54 P. 596, under the County Government Act, Stats.1893, p. 346; Proulx v. Graves, 143 Cal. 243, 76 P. 1025; Osborn v. Board of Supervisors, 27 Cal. App. 85, 148 P. 970; Deupree v. Payne, 197 Cal. 529, 241 P. 869; Shea v. Kerr, 1 Cal.2d 604, 36 P.2d 189; In re Stanton, 128 Cal.App. 659, 18 P.2d 384; 6 Cal. Jur. 10 Yr.Supp. 510.

[2, 3] Compton township as established by the ordinance of 1934 is the successor of Compton township and Dominguez township theretofore existing. Section 31. The new township is coterminous in bounds with the two former townships. The federal census of 1930 shows the former Compton township to have a population of 31,012, the former Dominguez township a population of 4,267, making a total population of 35,279 for the new Compton township.

At the time County of Los Angeles v. Justice's Court, supra, was decided, determining that the former Compton township had a population of less than 30,000 the statute did not provide the manner of ascertaining the population of a judicial township. Under the 1933 amendment to section 81, Code of Civil Procedure, the population of a judicial township "shall be deemed to be as shown by the last preceding census taken under the direction of the Congress of the United States," unless the population had been determined in a proceeding in mandamus prior to January 1, 1931, by this court. Since the enlarged Compton township did not come into existence until after 1931, the population thereof must be determined by reference to the federal census of 1930, which shows it to be in excess of 30,000. This statutory method of ascertaining population was upheld in Shea v. Kerr, supra, which involved the same ordinance as the instant case. Petitioner herein does not contend that the present population of the new Compton township is in fact less than 30,000.

[4] Petitioner further contends that the judgment against him is void for the reason that it fails to show that his failure to provide for his child was willful and without lawful excuse. Section 270, Pen.Code. The complaint charged that petitioner "willfully, unlawfully and without lawful excuse" failed to provide for said child. The case was tried by the court sitting without a jury. The verdict or finding of the court, as entered in the clerk's minutes, is as follows: "Guilty as charged in the complaint." This reference to the complaint constitutes a finding that the failure to provide was willful and without lawful excuse. People v. Cummings, 117 Cal. 497, 49 P. 576; People v. Sam Lung, 70 Cal. 515, 518, 11 P. 673; People v. Du Fault, 1 Cal.App.2d 105, 36 P.2d 196; People v. Camp, 42 Cal.App. 411, 421, 183 P. 845; 8 Cal.Jur. 403.

[5, 6] It is true that the judgment imposing sentence thereafter pronounced by the court (section 1445 and section 1449, Pen.Code, as amended by St.1933, p. 1423), as entered in the clerk's minutes (section 1453), contains no statement of the offense, but merely recites the sentence imposed on petitioner. However, the verdict of the jury or finding of the court adjudging the defendant guilty is part of the record or judgment roll in criminal cases tried in the justice's court. Section 1468, Pen.Code, as amended by St.1935, p. 2146; Rule 3, Rules Adopted by the Judicial Council, effective July 1, 1936. Where it appears from said record, as in this case, that the defendant has been convicted of the offense defined in section 270, Pen.Code, he will not be released for the reason that the minute entry of the judgment entered following said conviction fails to repeat the offense.

[7, 8] In view of the fact that a certified copy of the judgment as entered in the minutes constitutes the commitment or warrant under which the defendant is imprisoned (section 1455, Pen.Code), it is proper that such entry should state the offense of which defendant has been convicted. In the case herein, the minute entry of judgment did not itself recite the offense, but nevertheless a statement thereof was made in preliminary recitals of the commitment, certified by the justice of the peace. Petitioner was not prejudiced by the failure of the minute entry of judgment to recite the offense.

[9, 10] Section 1207, Pen.Code, as amended by St.1935, p. 461, relating to criminal trials in the superior court, provides that the clerk in entering the judgment rendered upon a conviction must state briefly "the offense for which the conviction was had." Section 1453, Pen.Code, providing for entry of the judgment in justice's court cases, does not make this requirement. We are not to be understood as indicating that by reason of section 1207, Pen.Code, the defendant in a superior court case would be entitled to release on habeas corpus if the minute entry of judgment failed to state the offense. If prejudiced by the omission, his remedy would be to secure a correction of the entry to state the offense of which he had been convicted by verdict of the jury or finding of the court entered in the minutes. The clerk's record may be amended to speak the truth. In re Barnes, 127 Cal.App. 708, 16 P.2d 309; In re Glavich, 74 Cal.App. 144, 239 P. 707; In re Huewitt, 102 Cal. App. 24, 282 P. 406; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; 6 Cal.Jur. 10 Yr.Supp. 524; 8 Cal.Jur. 477.

[11] It has been held that where there is a valid conviction by court or jury, but the judgment of imprisonment is void, as for the reason that it was entered on a holiday, or exceeds that allowed by law, the prisoner will not be discharged on habeas corpus, but held awaiting pronouncement and entry of a valid judgment. Matter of Smith, 152 Cal. 566, 93 P. 191; In re Lee, 177 Cal. 690, 696, 171 P. 958; In re McCready, 179 Cal. 514, 177 P. 459; Ex parte Fritz, 179 Cal. 415, 177 P. 157; In re Adams, 61 Cal.App. 239, 214 P. 467; 13 Cal.Jur. 280. In view of this rule, it is plain that a defendant is not entitled to release where the judgment of imprisonment is valid, but the only irregularity is that the entry thereof in the minutes fails to include a statement of the offense.

[12] Petitioner relies strongly on In re Cowan, 137 Cal.App. 209, 30 P.2d 443. In that case the petitioner was discharged on the ground that the judgment for six months' imprisonment failed to show that the failure to provide was willful and without lawful excuse. It does not appear from said decision that there was any adjudication to that effect in the record. In the case herein the finding of the court, as entered in the minutes, constituted an adjudication that the offense was willful and without lawful excuse. Said finding supports the judgment imposing a year's imprisonment.

The writ is discharged and the petitioner remanded.

We concur: WASTE, C. J.; HOUSER, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

11 Cal.2d 20

HOWLAND v. HOWLAND et al.*

L. A. 16432.

Supreme Court of California.

March 21, 1938.

1. Appeal and error 🔑117

An order terminating proceedings in the trial court with respect to preparation of record affects judgment appealed from and is an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Appeal and error 🔑337(1)

A motion to dismiss appeal from judgment in action to quiet title on ground that lower court had entered order terminating proceedings for record, which was made during pendency of appeal from order terminating proceedings for record, was denied as premature without prejudice to renewal of motion after disposal of appeal from order.

In Bank.

Appeal from Superior Court, Los Angeles County.

Action to quiet title by Lotus Howland against George D. Howland and another. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal.

Motion denied without prejudice.

Frank M. Benedict, of Los Angeles, for appellants.

Glen Behymer, of Los Angeles, for respondent.

CURTIS, Justice.

Motion by respondent to dismiss an appeal from a judgment made and entered in favor of respondent and against appellants. Two appeals were taken by appellants to this court: (1) An appeal from a judgment in an action to quiet title to certain real property located in Los Angeles county, and (2) an appeal from an order of the superior court of said county of date July 2, 1937, denying appellants' motion to settle the bill of exceptions and granting respondent's motion to terminate all proceedings for the settlement thereof.

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* Dismissed from bench Aug. 31, 1937; Rehearing granted Sept. 30, 1937; Submitted on appeal Feb. 2, 1938; No opinion.

The motion to dismiss the appeal from the main judgment, which is the motion now before us for disposition, is made upon the ground that no transcript has been filed and that the lower court has made its order terminating proceedings on the appeal. The following proceedings took place in the lower court. Plaintiff on October 11, 1934, commenced an action to quiet title to certain real property in Los Angeles county. Judgment for the plaintiff was signed and filed July 22, 1935. On February 4, 1936, hearing upon the settlement of a proposed bill of exceptions was had, and the court entered its order requiring defendants to draw and prepare a new proposed bill of exceptions. On February 17, 1936, the same bill of exceptions having been resubmitted for settlement, the bill of exceptions was ordered off the calendar to be reset at a later date. On July 2, 1937, respondent moved the trial court to terminate proceedings for settlement of the bill of exceptions and all other proceedings in the trial court with respect to the appeal therein. Appellants at the same time made a motion to settle the proposed bill of exceptions. Respondent's motion to terminate all proceedings was granted, and appellants' motion was denied. On August 18, 1937, appellants filed their notice of appeal from said order of July 2, 1937, and served a proposed bill of exceptions on appeal from said order within the proper time.

[1, 2] It is well settled that the order terminating proceedings in the lower court with respect to the preparation of a record affects the judgment appealed from, and is an appealable order. W. J. Somers Co. v. Smith, 45 Cal.App. 703, 188 P. 311; Struck v. Superior Court, 138 Cal. App. 672, 32 P.2d 1110; Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922. This being so, it follows that, during the pendency of the appeal from the order terminating in the lower court the proceedings for a record, the motion of respondent to dismiss the appeal from the main judgment is premature and should be denied. W. J. Somers Co. v. Smith, supra.

The motion to dismiss the appeal from the main judgment is denied without prejudice to renew the motion if the appeal from the order terminating proceedings for a record in the lower court is decided adversely to appellants.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.; LANGDON, J.

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25 Cal.App.2d 265

ALEXANDER v. WONG YICK et al.

Civ. 10473.

District Court of Appeal, First District, California.

March 8, 1938.

Rehearing Denied April 7, 1938.

Hearing Denied by Supreme Court May 2, 1938.

1. Municipal corporations 🔑822(1)

In action against occupants of building for injuries sustained by delivery man when trap doors in sidewalk fell upon his hand, instructions which fixed liabilities on defendants for the actions of others over whom they had no control and for acts of which defendants had no knowledge were error.

2. Negligence 🔑48, 59

The owner or occupant of realty is not liable for the unknown acts of negligence of an invitee when the danger is obvious and apparent to the invitee and not within the knowledge of the owner or occupant or is such as may not be anticipated by him.

3. Municipal corporations 🔑817(2)

In action against occupants of building for injuries sustained by delivery man when trap doors fell upon his hand, and bars placed to keep the doors open were not in place and the doors were not in the exclusive control of the occupants, and delivery man's knowledge of the cause of the accident was equal to that of occupants, the doctrine of res ipsa loquitur was inapplicable.

4. Negligence 🔑121(2)

The hypothesis of the doctrine of "res ipsa loquitur" is that ordinarily the one injured is not in a position to know more than that by some unusual movement of the instrumentality he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

5. Negligence ⚷121(2)

If it is shown that operator of instrumentality by means of which injuries are inflicted has no superior knowledge or by exercise of reasonable care was unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information which is reasonably accessible to the operator of the machine, doctrine of res ipsa loquitur is inapplicable.

◆

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Action for personal injuries by James Alexander against Wong Yick and others, as individuals and copartners, doing business under the firm name of Fong Fong Bakery & Ice Cream Parlor, and others. Judgment for the plaintiff, and Phillip Fong and Fong Fong Bakery & Ice Cream Parlor appeal.

Reversed.

Bronson, Bronson & Slaven and Bronson, Bronson & McKinnon, all of San Francisco, for appellants.

Elmer P. Delany, and Joseph A. Brown, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendants and appellants occupied premises, consisting of a store and basement, in which they conducted a bakery. The store was on the ground floor of the building, level with the sidewalk. The basement had an entrance through the sidewalk, which was closed by two iron doors when not in use. These doors opened upwards and outwards and to each was attached a chain, which was also attached to the sidewalk, and which held the doors at an angle of a little more than 90 degrees outward from the opening, but did not prevent them from closing. An iron bar was provided to be attached to each door when open to prevent the doors from closing when the entrance was in use. While repairs were being made in the basement, the plaintiff, with two helpers, was engaged in delivering lumber to the basement for the use of the workmen making these repairs. While carrying some lumber down the steps through this entrance, one of the doors fell upon plaintiff or plaintiff slipped on the stairs and seized the chain attached to one of the doors. This door fell upon his hand, causing the injury for which he had a verdict.

There is no material dispute in the evidence. The sidewalk entrance was constructed and maintained in accordance with a local ordinance. An iron bar was provided to keep the doors from closing while the entrance was in use, but it was not attached to the doors at the time of the injury. There is no evidence as to who opened the doors or as to who failed to attach the iron bar. There is no evidence as to how many of the other workmen about the premises used the entrance prior to plaintiff's injury. There is no evidence that any of the defendants or any of their employees knew that the entrance was being used at the time, or that the protecting bar was not in place. The evidence is that the entrance was in every respect similar to those in use throughout the city, and that the presence or absence of the iron bar could be easily seen. The plaintiff was an experienced delivery man and truck driver. He had worked as such for about ten years and was "accustomed to trap doors" and to "elevated doors" in making his deliveries. He testified that he did not slip upon the stairs leading to the basement; that he did not fall; but that one of the doors first struck him on the head and then fell upon his hand.

[1, 2] Upon these facts the trial court instructed the jury, in what closely approached the character of "formula" instructions, that, if they found "that some invitee (other than plaintiff or his assistants or companions) of the defendants or some employee of the defendants carelessly and negligently left the trap doors open without the iron bar to keep them from closing" then plaintiff should recover. This admonition was repeated in other instructions, all given at plaintiff's request, and was not cured by any other instruction given. The vice of these instructions is that they fix liability on the defendants for the acts of others over whom they had no control, and for acts of which the defendants had no knowledge and no means of knowledge. Manifestly, the owner or occupant of real property is not liable for

the unknown acts of negligence of an invitee, particularly when the danger is obvious and apparent to the plaintiff and not within the knowledge of the owner or occupant or is such as may not be anticipated by him.

The rule is stated in 20 Ruling Case Law, pages 56 and 57, as follows: "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. * * * The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. In the language of Mr. Justice Harlan [Bennet v. Louisville, etc., R. Co., 102 U.S. 577, 26 L.Ed. 235], the owner is liable to invited persons for injuries 'occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such invitation.'" In accord with the text are Mautino v. Sutter Hospital Association, 211 Cal. 556, 560, 296 P. 76; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P.2d 801.

At plaintiff's request the jury was instructed that "when a thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

[3] The res ipsa loquitur doctrine has no application to this case, first, because the instrumentality causing the injury was not in the exclusive management and control of the defendants, and, second, because the actual cause of the accident was known and fully explained in the evidence. Upon the first point the following authorities are controlling: Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 58 A.L.R. 129; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 783, 22 P.2d 554; Biddlecomb v. Haydon, 4 Cal.App.2d 361, 364, 40 P.2d 873; Parker v. James Granger, Inc., 4 Cal.2d 668, 676, 52 P.2d 226; Klenzendorf v. Shasta U. H. School Dist., 4 Cal.App.2d 164, 170, 40 P.2d 878; Speidel v. Lacer, 2 Cal.App.2d 528, 532, 38 P.2d 477.

[4, 5] The second reason is supported by these observations and authorities: The reason for the application of the doctrine of res ipsa loquitur, and the very hypothesis of the doctrine, is that "ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident." 19 Cal.Jur., pp. 706, 707. "The converse of this rule is likewise true. If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application." Johnson v. Ostrom, 128 Cal.App. 38, 43, 16 P.2d 794, 795; Keller v. Pacific Tel. & Tel. Co., 2 Cal.App.2d 513, 525, 38 P.2d 182; Creamer v. Cerrato, 1 Cal.App.2d 441, 444, 36 P.2d 1094; Gorden v. Goldberg, 3 Cal.App.2d 659, 661, 40 P.2d 276; Jianou v. Pickwick Stages System, 111 Cal.App. 754, 756, 296 P. 108; Klenzendorf v. Shasta U. H. School Dist., 4 Cal.App.2d 164, 169, 40 P.2d 878; Barbieri v. Law, 209 Cal. 429, 433, 287 P. 464.

Here plaintiff's case in short is that his injuries resulted from one of the iron doors falling upon his hand, and that the door fell because the protecting iron bar had not been attached. The parties concede that the bar was not attached at the time of the accident, and that the absence of the bar was the proximate cause of the injuries. Thus, plaintiff's knowledge of the cause of the accident was equal, if not superior, to that of the defendants. There is no room for the res ipsa loquitur doctrine in such a case.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

25 Cal.App.2d 270

WESTERN TALC CO. v. BLAUFUSS.

Civ. 5908.

District Court of Appeal, Third District, California.

March 8, 1938.

1. Evidence ⚷417(12)

In action for money alleged to be due on contract for purchase of product known as "Bentonite," evidence that product shipped did not meet specifications agreed on in oral conversation was admissible as against contention that evidence varied terms of written contract, where letter in evidence from seller to buyer referred to terms agreed on in same oral conversation in which buyer claimed specifications were agreed on.

2. Account stated ⚷8

An account stated does not operate as an estoppel but may be impeached for fraud or mistake, and the account is not conclusive on the parties if either of such elements is pleaded and the evidence adduced in support of the pleading proves that there has been mistake, fraud, or undue advantage by which the account is in truth vitiated and the balance incorrectly fixed.

3. Account stated ⚷8

The buyer of a product known as "Bentonite" was not bound by account stated arising from written reply to letter fixing amount due on contract in which buyer asked for extension of credit for at least three months before starting payment, where it was shown that at time of letter buyer assumed that product he had received was "Bentonite," when in fact product was ammonium silica which was valueless to buyer, and that buyer did not discover mistake until several months after writing letter.

4. Account stated ⚷18(1)

In action for balance due on contract for purchase of product known as "Bentonite" wherein seller relied on account stated and buyer filed answer containing general denial and cross-complaint for damages for failure of seller to deliver product ordered by buyer, permitting buyer during trial to file amended answer setting up defense of mistake to cause of action on account stated was not error.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action for balance due on contract for sale and on account stated by the Western Talc Company against George Blaufuss, doing business as the Western Cider Works, wherein the defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Calkins, Hagar, Hall & Linforth, of San Francisco, and Nathan F. Coombs, of Napa, for appellant.

Rutherford, Rutherford & Rutherford, of Napa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The complaint in this action contains two counts. The first count alleges that within two years last past defendant became indebted to plaintiff in the sum of $570, for goods, wares, and merchandise, to wit, 38,000 pounds of bentonite at an agreed price of $30 per ton, sold and delivered by plaintiff to defendant at the special instance and request of defendant. The second count in the complaint reads as follows: "That within two years last past, in the City of Napa, County of Napa, State of California, an account was stated between plaintiff and defendant, and upon such statement a balance of $570 was found to be due to plaintiff from said defendant which said defendant then and there agreed to pay to the plaintiff."

The first answer of the defendant contains a general denial of the allegations contained in the complaint, and also a cross-complaint in which the defendant asked for damages in the sum of $1,336.61, for and on account of plaintiff's failure to deliver the product ordered by the defendant. During the course of the trial the defendant filed an amended answer in which it set up a defense to the plaintiff's alleged cause of action on a contract stated, to wit: That the alleged promise of the defendant to pay the plaintiff the sum of $570 was made through mistake and at a time when the defendant did not know that the plaintiff had failed to ship the kind and quality of merchandise theretofore ordered by the defendant from the plaintiff, but had shipped to the defendant an entirely different product.

The defendant asked judgment, first, that the plaintiff take nothing by reason of its action, and, second, that it recover of and from the plaintiff the damages alleged in the cross-complaint.

Upon this appeal no question is presented as to the sufficiency of the evidence to sustain the judgment for damages in favor of the defendant, if the defendant is entitled to any judgment. Upon this appeal the plaintiff relies exclusively upon a certain letter and telegram hereinafter set forth, contending that the evidence introduced in the case was for the purpose of varying a written contract, and therefore was inadmissible.

It is also claimed by the appellant that the order for the merchandise to be delivered, its quality and kind, was definitely fixed by the telegram, to wit, that it should be according to sample without any designation or qualifying words as to the grade or quality of the sample. The contention of the plaintiff is not made exactly in the words which we have stated, but is to the same effect.

It appears that the letter which we shall hereinafter set forth was received by the defendant, and immediately thereafter a telegram, which we will set forth, was sent by the defendant to the plaintiff. However, immediately following the telegram, which stated that a letter would be written in connection with or following the telegram, the defendant boarded a train for Los Angeles, went to the office of the plaintiff in that city, and there, in conversation with the president of the plaintiff, specified the kind and quality of the material which he desired. On the part of the plaintiff it is alleged that what took place at this visit is no part of the order. However, a letter written by the plaintiff to the defendant directly controverts this contention. The subject of the controversy is a clay material found near Barstow, in the state of California. The material desired by the defendant, and theretofore purchased from the successors of the plaintiff, was and is known as "Bentonite No. 1"; that this "Bentonite No. 1" was used by the defendant in making a preparation for the softening of water, and sold by him to customers engaged in the laundry business; that this material must be sufficiently pulverized or ground to admit of its passing through a 200-mesh screen, practically as fine as flour.

The record shows that prior to the receipt of the letter which we are about to quote, the defendant had been making some inquiries of distributing agents in Los Angeles, as to where he could obtain "Bentonite No. 1" to use in his business. Following this, a letter was written by the president of the plaintiff to the defendant, which letter is in these words:

"Western Talc Company
"Producers and Distributors of
Non-metallic Materials.
"Custom Grinding
"1901–11 East Slauson Avenue
"Los Angeles, California.
"June 5, 1935.

"Western Cider Works,
"Napa, California.

"Gentlemen: We are sending you today, by freight, two bags of unground No. 1 Bentonite. This material is mined from the same property and we believe is the same grade as that which we are mining and selling to you in 1928 and 1929.

"As you will recall, we several years ago discontinued the operation of that particular Bentonite property. However, we still have the property, and can arrange to ship you the ground product, provided we could have an order of from fifteen to twenty tons. In order to get this ore out it will necessitate our sending a special crew and opening up the mine. Should you want this material, we will quote you at the price of $30.00 per ton, f.o.b. Los Angeles.

"Kindly let us know promptly whether or not you will want us to get this material out for you, and if you do, we will go right after it, and should be able to make shipment within a week or ten days after we receive your order.

"Yours very truly,
"(Signed) Western Talc Company
"By F. H. Savell
"F. H. Savell."

Upon the receipt of this letter a telegram in the following words was sent from Napa to the plaintiff in this action:

"Western Union
(50).

"Received at 5973 Avalon Blvd., Los Angeles Calif.

"Telephone AX ridge 1937 Century 1935 Jun 8 A. M. 8:52

"SJ 41 9XC—Napa, Calif. 8
"837A
"Western Talc Co.
"1901 East Slauson Ave,
"Will take fifteen tons like sample Rush Letter follows.
"Western Cider Works."

Immediately after the foregoing telegram was forwarded to the plaintiff the defendant, as hereinbefore stated, went to Los Angeles, visited the office of the company, and had a conversation with the president of the company relative to the quality of the material that could be used in the business conducted by the defendant, and the quality necessary for him to receive in order that it might be of any use to the defendant. It may be here stated that the two bags of sample material sent by the plaintiff to the defendant contained unground material, and therefore could not be tested and its quality or grade or usefulness determined by the defendant, as he had no machine with which to grind the same to the required fineness. Realizing this, the defendant, as stated in his testimony, went to Los Angeles to make the order for the material more definite and certain.

Following the visit of the defendant to the plaintiff's office in Los Angeles, the plaintiff shipped 38,000 pounds of material, taken from its mine in Barstow, to the defendant at Napa. We set forth the invoice of this shipment, to wit:

"Form 103 7–34 2M
"Invoice.
"Western Talc Company
"Producers and Distributors of Non-Metallic Materials
"Custom Grinding
"1901–11 East Slauson Avenue
"Lafayette 2129
"Los Angeles, California

"Sold to	Invoice No. 10779
Western Cider Works,	Your Order No.
Napa, Calif.	D. O. No. 14925
Terms: Net Cash.	Car No.
38,000 lbs. Bentonite #1. @ 30.00 per ton F.O.B. L. A. Harbor	Route LA & Long Beach Dispatch Line. 570.00"

This invoice describes a shipment as "38,000 lbs. of Bentonite No. 1," thus attempting to certify to the quality of the material shipped.

As to when the order was finally given, and what amounted to the order, and whether the plaintiff relied upon the telegram or upon the verbal order or subsequent order given by the defendant to the plaintiff, we set forth a letter written by the president of the plaintiff to the defendant, to wit:

"Western Talc Company
"Producers and Distributors of Non-metallic Minerals
"Custom Grinding
"1901–11 East Slauson Avenue
"Phone Lafayette 2129.
"Los Angeles, California.
"July 31, 1935.
"Western Cider Works, Napa, California
"Attention: Mr. Blausfuss.

"Gentlemen: We respectfully direct your attention to our invoice No. 10779 of June 19th, in the amount of $570.00.

"According to the terms for payment, upon which you agreed when you were in our office and placed the order with us, you were to pay one-third cash upon presentation of invoice, one-third in thirty days, and the balance in sixty days. As yet, we have not had the pleasure of receiving any remittance from you whatever, and inasmuch as we went to considerable expense in the securing of this material especially for you, we would be very appreciative if you would forward us your check in accordance with the terms of payment.

"Thanking you in anticipation of your prompt compliance, we are,

"Yours very truly,
"Western Talc Company
"By F. H. Savell.
"F. H. Savell."

[1] This letter, as we have stated, directly controverts the contention made by the appellant that the telegram set forth herein was the complete order for the shipment of the material made by the plaintiff to the defendant. It will be noted that the invoice of the material shipped made no reference to the sample theretofore sent by the plaintiff to the defendant, and we may here add that there is not a word in the record showing that the 38,000 pounds of clay material shipped by the plaintiff to the defendant corresponded in any particular with the samples contained in the two sacks mentioned in the letter of the plaintiff to the defendant. Nor was any testimony introduced by the plaintiff showing that the invoice correctly described the quality of the shipment.

The basis of the appellant's contention that the defendant is bound by an account stated rests upon a letter written by the defendant to the plaintiff, dated August 3, 1935, to wit:

"Carbonated Sweet
Cider in bottles
Pure Apple Juice
in bulk and glass
jars

Pure Cider Vinegar
Apple Syrup
Apple Butter
Boiled Cider.

Awarded
Gold Medal
Panama Pacific
Exposition.

Western Cider
Works
George Blaufuss,
Prop. Phone
653-W
Manufacturers of
the Saxon Brand
Apple Ciders.
Napa, Calif.
Aug. 3, 35.

"Western Talc Co. Los Angeles, Calif.
"Attention: Mr. F. H. Savell.

"Dear Sir: I have been wanting to write you long before this. I almost despaired because I was afraid that I could not use that shipment of Bentonite at all. It is not the same material that we had five years ago.

"We have to burn it at 245 degrees higher before it will stand the hydration treatment. It took us a long time to find that out. In the meantime, we was compelled to make a shipment of a ton-and-a-half of softener because the party had made a down payment. Unfortunately, it takes approximately 10 days to find how the mineral will act after it is finished. We took a chance on the ton-and-a-half, and now we had to take it back again and give the man his money back.

"We have used up a third of the shipment and we have only one ton that will give 80 grains per pound instead of 125 as we had guaranteed our prospects. The vitrification point and point of hardness are so close that I was compelled to put in a new pyrometer equipment in order to handle it at all. I have been under a tremendous expense for fuel, labor and chemicals besides. And we have practically nothing to sell. I do not blame you directly for this because I believe you thought you was giving me the same material. But I have to ask you now to give me lots more time for the payments. I had to mix some other material with the Bentonite in order to get it up to 80 grains. I will have to sell it at a reduced price in order to compete with the capacity of other base exchange material.

"My cider season is now at hand and I will have to stop for two or three months before going any further with the softener. In the meantime, I must ask you, under the circumstances, to extend me a credit for at least three months before the payments start. I expect to have a good run on the cider and can use the profits of that to pay for this Bentonite.

"Hoping that you will be able to see the difficulties that I am working under, and grant my request, I am,

"Yours very truly,
"(Signed) George Blaufuss."

The amended answer of the defendant raises the question for consideration by the court that this letter was written under a mistake as to the quality of the material theretofore shipped by the plaintiff to the defendant, and before he had fully ascertained that it was not "Bentonite No. 1," or bentonite at all, and that he subsequently did ascertain, from having a chemical analysis made, that the material shipped was known as "Ammonium Silica." It appears from the record that "Ammonium Silica" and "Bentonite No. 1" come from the same mine near Barstow, but in different portions thereof. The record shows an abundance of testimony, not only that the shipment made by the plaintiff to the defendant was not "Bentonite No. 1", as described in the invoice, but was not bentonite at all. The record contains much testimony showing the difference in the material, which, however, it is unnecessary to set forth herein as the sufficiency of such testimony is not questioned by the appellant.

[2] The contention of the appellant that the alleged account stated could not be questioned is sufficiently answered in the case of Budd v. Hough, 100 Cal.App. 103, 279 P. 1074, 1075, and likewise, the grounds upon which such an account may be impeached is set forth definitely, to wit: "As uniformly held, an account stated does not operate as an estoppel, but may be impeached for fraud or mistake; and if either of those elements are pleaded, and the evidence adduced in support of the pleading proves that there has been any mistake, fraud, or undue advantage, by which the

account is in truth vitiated, and the balance incorrectly fixed, the account is not conclusive upon the parties. Union Lbr. Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; Vaughan v. County of Tulare, 56 Cal.App. 261, 205 P. 21; Gardner v. Watson, 170 Cal. 570, 150 P. 994; 1 Am. & Eng. Ency. of Law, 2d Ed. 463. Moreover, section 1700 of the Civil Code provides that the material alteration of a written contract by a party entitled to any benefit under it extinguishes all executory obligations of the contract in his favor against the parties who do not consent to the act." Further citation of authorities on this point seems to us unnecessary.

[3] In view of what we have stated and what the record shows, as set forth herein, we do not very well perceive any necessity for following the discussion of the appellant any further as to the subject of warranties and the different cases holding that under the circumstances in the different cases involved no warranties could be either expressly or impliedly held to exist. The record shows, as set forth herein, that the plaintiff assumed, and in its invoice represented that it had shipped to the defendant "Bentonite No. 1," whereas in truth and in fact there is sufficient testimony in the record upon which the jury had a right to conclude that the plaintiff did not ship "Bentonite No. 1" or any bentonite at all, but did ship to the plaintiff a clay composition known as "Ammonium Silica," which was of no value whatever to the defendant, but which, in his attempt to use the same, greatly injured his business and damaged him in the sum alleged.

There was also sufficient testimony in the record to support the conclusion of the jury that the defendant, when he read the letter of August 3, 1935, was acting under a mistake and misapprehension as to what kind of product the plaintiff had shipped to him, and did not ascertain the same until some months afterwards.

[4] The contention of the appellant that it was error for the court to allow the defendant to file an amended answer seems to us wholly without merit.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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25 Cal.App.2d 408

PEOPLE v. RICHARDSON.

Cr. 509.

District Court of Appeal, Fourth District, California.

March 17, 1938.

1. Witnesses 🔑397

The impeachment of witnesses by proof of statements made by them inconsistent with their testimony at the trial merely affected the weight of their evidence.

2. Criminal law 🔑1159(4)

In prosecution for negligent homicide arising out of an automobile collision, the acceptance by the jury of testimony that accused was driving automobile at time of the collision, by witnesses who previously had made statements that the deceased party was driving the automobile at time of accident, was binding upon appeal.

3. Criminal law 🔑438

In prosecution for negligent homicide arising out of automobile collision, exhibits consisting of photograph of tracks of accused's automobile at scene of the collision and of the automobiles which collided, which tended to prove the accused's automobile was driven from its right to left side of highway and into oncoming automobile, were admissible.

4. Criminal law 🔑404(4)

In prosecution for negligent homicide arising out of automobile collision wherein the accused contended that the deceased was driving the automobile at time of the collision, exhibits consisting of piece of metal from right door of automobile found with deceased's clothing and hair found on right side of automobile and sample of deceased's hair were admissible to corroborate testimony that accused was driving automobile and contradict testimony that deceased was the driver.

5. Criminal law 🔑829(1)

The refusal of a requested instruction was not error, where subject matter of instruction was covered by given instructions.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Richard Charles Richardson was convicted of negligent homicide, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., for the People.

MARKS, Justice.

Defendant was convicted of negligent homicide and has appealed from the judgment pronounced upon him. He presents three grounds for reversal of the judgment: Insufficiency of the evidence to support the verdict and judgment; error in overruling his objections to the admission of evidence; error in refusing to give an instruction requested by him.

On October 5, 1937, Richardson, Roy Anderson, and two young women were riding south on highway 99 in an automobile belonging to defendant. A truck with a trailer attached was preceding them on the west half of the paved portion of the highway. Another automobile, belonging to Thomas E. Moon, was approaching, traveling north on the east half of the paved portion of the highway. When this automobile was opposite the rear of the truck, defendant's automobile attempted to pass the truck and trailer and was driven over to the east half of the roadway and into the Moon car. Roy Anderson was killed and the two young women were injured in the collision.

Defendant's attack on the sufficiency of the evidence is based upon the sufficiency of the proof that he was driving his automobile at the time of the accident. For a number of days after the accident both young women told numerous persons that Roy Anderson was driving at the time of the accident. They then changed their stories and told all interested persons that defendant was the driver. They so testified at the trial. They explained their conflicting statements as follows: That immediately after the accident defendant told them that he would get into trouble if it were discovered that he was the driver; that Anderson was dead and could not be punished for the wreck; that defendant asked them to say that Anderson was driving; that they agreed to do this, and did so, until they learned that they would be called as witnesses and would have to testify under oath, when they decided they would have to tell the truth. They told defendant of this decision and thereafter told all concerned and testified that defendant was the driver.

[1, 2] This impeachment of these two witnesses merely went to the weight of the evidence. The jury accepted their testimony that defendant was driving the car at the time of the accident as true, which is binding on this court on appeal. It should be remarked that there was strong circumstantial evidence tending to show that Anderson was not the driver of the automobile at the time of the accident.

[3, 4] The People offered in evidence numerous exhibits to the introduction of which defendant objected on the ground that none of them tended to prove or disprove any issue in the case. These exhibits are not in the record. Descriptions of them given by witnesses indicate that they consisted of photographs of the tracks made by defendant's car when it went from its right to its left side of the highway, various photographs of defendant's and of the Moon automobile, a piece of metal from the inside of the right door of defendant's car that was found with the clothing worn by Anderson, some hair from a tack taken from the right side of defendant's car, and a sample of Anderson's hair. These exhibits were material and competent. Some of them tended to prove that the automobile of defendant was driven from its right to its left side of the highway and into Moon's car. Others tended to corroborate the testimony of the two young women that defendant was driving his automobile and to contradict his testimony that Anderson was the driver. There was no error in overruling defendant's objection to the introduction of these exhibits in evidence.

[5] There was no error committed in refusing the instruction proposed by defendant. It was not a correct statement of the law. Its subject matter was covered by other proper instructions given by the trial court.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

25 Cal.App.2d 416

PEOPLE v. VAN SCOYOC.

Cr. 3040.

District Court of Appeal, Second District, Division 1, California.

March 18, 1938.

1. Criminal law 🔑400(4)

In prosecution for grand theft of automobile and forgery of cashier's check, examination of officer of bank in which check was deposited as to whether check was honored was improper but was not reversible error where evidence was sufficient to establish the corpus delicti.

2. Criminal law 🔑563

Slight or prima facie evidence is sufficient to establish the corpus delicti.

3. Forgery 🔑44
Larceny 🔑65

Evidence warranted conviction for grand theft of automobile and forgery of cashier's check.

◆

Appeal from Superior Court, Los Angeles County; Kenneth C. Newell, Judge.

Theodore M. Van Scoyoc was convicted of grand theft and forgery, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was charged in an information with the offenses of grand theft and forgery, was found guilty of both offenses by the court, sitting without a jury. The appeal herein is from the judgment and from an order denying a motion for a new trial.

Briefly, the facts are as follows: On May 13, 1936, defendant appeared at the office of a company in Pasadena engaged in the business of renting automobiles by the day. After inquiring of the manager thereof as to the cost of renting an automobile for one day, defendant produced a "Cashier's Check" drawn on the First National Bank of Manhattan, Manhattan, Kan., signed William Ryan, assistant cashier, and made payable to the order of "Burton Marion Rodgers" in the sum of $25. Defendant asked if the check would be accepted as a deposit, and, upon being informed that it would be accepted if indorsed, defendant indorsed it as "Burton Marion Rodgers." Defendant stated that he wanted the car for one day. A contract was then executed between the rental company and defendant, and the latter departed in a rented car, which was a Ford Sedan bearing a 1936 California license, No. 7 P 1336.

The "cashier's check" was held in the office of the company until the following day, and, as the car had not been returned at that time, the check was brought to the police department. It was later deposited with the First Trust & Savings Bank, in Pasadena, forwarded for collection, and was returned unpaid. About two months later defendant was located in Chattanooga, Tenn., from which place he was returned to this state. The arresting officer testified that while he was in Chattanooga, he saw a Ford Sedan bearing a 1936 California license, No. 7 P 1336, in a garage used by the Chattanooga police department for impounding automobiles.

Mr. R. H. Whitehouse, manager of the First Trust & Savings Bank, in Pasadena, testified that he had made a search of certain bank directories for the year 1936, and that his search disclosed that there was a bank known as the First National Bank of Manhattan, Kan., but that the directories, which listed the officers and assistant cashiers of that bank, did not list or disclose an assistant cashier by the name of William Ryan.

Appellant contends: First, that the trial court erred in permitting the witness Whitehouse to testify to the fact that no money had been paid on the check in question; second, in admitting testimony regarding the result of a search of bank directories by the witness Whitehouse; third, in admitting the check in evidence; and, finally, that the court erred in finding the defendant guilty of either offense.

[1, 2] The witness Whitehouse was asked the following question: "* * * Do you know whether or not that check was honored when presented?" The objection to this question was overruled and the answer was: "It was not honored, no." The objection was well-founded and should have been sustained. It does not follow, however, that such error warrants a reversal of the judgment. The evidence was sufficient to establish the corpus delicti,

in connection with which it should be noted that slight or prima facie evidence is sufficient. People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741; People v. Hill, 2 Cal.App. 2d 141, 155, 37 P.2d 849.

[3] The corpus delicti as to each offense having been established, the evidence of the facts and circumstances surrounding the commission of such offenses, together with the evidence of defendant's confession, was abundantly sufficient to support the judgment.

Appellant's other objections, above noted, are trivial.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.

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25 Cal.App.2d 365

SAVELLI v. SIMON.

Civ. 11693.

District Court of Appeal, Second District, Division 2, California.

March 16, 1938.

1. Gifts 🔑18(2)

To constitute a valid gift inter vivos of personalty, there must be an actual or symbolical delivery of property to donee, and donor must intend to divest himself completely of control and dominion over property.

2. Appeal and error 🔑1008(1)

Whether donor in delivering property intended to divest himself completely of control over it is a fact question to be determined by trial court from all of evidence in case.

3. Appeal and error 🔑996

Where different conclusions may be reasonably drawn from evidence by different minds, trial court's findings of fact will not be disturbed on appeal.

4. Gifts 🔑49(3)

Evidence that document, stating that decedent's life policy was assigned to plaintiff but that policy had been left in care of decedent's son to be delivered after his death, was delivered to plaintiff by decedent in sealed envelope bearing written direction that it should not be opened until after decedent's death, established that decedent did not make immediate gift of policy during his lifetime.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Louise M. Savelli against Bertram B. Simon, executor of the estate of Herman Simon, deceased, to recover the amount paid defendant as executor on a life insurance policy allegedly assigned to plaintiff by defendant's testator. Judgment for defendant, and plaintiff appeals.

Affirmed.

Wilbert C. Hamilton and John F. Hoornaert, both of Los Angeles, for appellant.

Henry Haves, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover the amount paid defendant as executor on a life insurance policy alleged to have been assigned to plaintiff by defendant's testator, plaintiff appeals.

The conceded facts are:

October 6, 1934, Herman Simon, defendant's testator, handed to plaintiff a sealed envelope upon which was written:

"For Mrs. Louise M. Savelli, Personal
Not to be opened until after my death
"Herman Simon."

June 7, 1936, Herman Simon died; and upon opening the envelope, which had been continuously in her possession since October 6, 1934, plaintiff found that it contained a document reading as follows:

"Los Angeles, Cal.
"October 4th/1934.

"I hereby give & assign Policy 130890 of New England Life Insurance taken out November 15th/1899

"20 Payment Life

"To my friend, Louise M. Savelli for kindnesses & Care to me

"To be delivered to her at my death. I am leaving this Policy in the Vault in care of my Son Bert Simon to deliver to Mrs. Louise M. Savelli in person after my death
"[Signed] Herman Simon
"Witness
"H. Y. Hughy."

In policy No. 130890 mentioned in the foregoing document "the executors, administrators or assigns" of Herman Simon were designated as beneficiaries. This designation was made February 23, 1932, and was never subsequently changed. After defendant's appointment as executor of Herman Simon's estate, the New England Mutual Life Insurance Company paid the sum of $5,766.37 to him as the amount due under its policy No. 130890. Thereafter plaintiff instituted this suit to recover from defendant the aforesaid sum.

This is the sole question presented for determination:

Was there substantial evidence to sustain the trial court's findings that:

(a) Subsequent to February 23, 1932, the named beneficiaries, to wit, the executors, administrators, or assigns of Herman Simon in policy No. 130890 issued by the New England Mutual Life Insurance Company, had not been changed;

(b) Herman Simon did not assign during his lifetime the aforementioned life insurance policy?

[1] The foregoing question must be answered in the affirmative. It is settled law of this jurisdiction that for a valid gift inter vivos of personal property the following elements must be present:

(1) There must be an actual or symbolical delivery of the gift to the donee.

(2) The donor must intend to divest himself completely of control and dominion over the property which is the subject of the gift. Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 550, 254 P. 306; Beebe v. Coffin, 153 Cal. 174, 177, 94 P. 766.

[2-4] It is likewise settled that the intention of the alleged donor is a question of fact to be determined by the trial court from all of the evidence in the case (Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 550, 254 P. 306; Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 502, 238 P. 1034), and that where different conclusions may be reasonably drawn from the evidence by different minds the trial court's findings of fact will not be disturbed on appeal. That the insured did not intend to make an immediate present gift of the insurance policy to plaintiff nor intended to release all his rights and control over it to her, but intended that should she survive him and not otherwise the proceeds thereof should be paid to her, may reasonably be drawn from the facts above set forth; and thus there is sufficient evidence to sustain the findings of fact of the trial court here questioned.

The judgment is affirmed.

We concur: CRAIL, P. J., WOOD, J.

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25 Cal.App.2d 368

PEOPLE v. HARVEY et al.

Cr. 3068.

District Court of Appeal, Second District, Division 2, California.

March 16, 1938.

1. Criminal law ⇨1144(13)

On appeal from a conviction, evidence was viewed most favorably to the prosecution.

2. Criminal law ⇨1159(2)

A conviction which is supported by substantial evidence considered in connection with such inferences as may be reasonably drawn will not be reversed.

3. Larceny ⇨66

Evidence that defendant sought to compel motorist to produce his driver's license as motorist stepped from his automobile in front of his home at about 1 o'clock in the morning by threatening to shoot him, but was frightened away as another automobile approached, sustained conviction for attempted grand theft.

4. Larceny ⇨66

Evidence that defendant had stated to police officers that he and codefendant had attempted to hold up several automobiles on a certain evening was insufficient to sustain conviction for attempted grand theft of automobile belonging to owner who testified that, at time he was stopped by codefendant, there was no other person present.

5. Larceny ⇨56

The "corpus delicti" of grand theft includes a person from whom the property may be taken, an intent to take such property against the will of the owner, and an act performed tending to accomplish such result.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words & Phrases.]

6. Criminal law ⚷44

The commencement of an actual transaction which would have ended in a crime if not interrupted is an "attempt to commit" the crime.

[Ed. Note.—For other definitions of "Attempt to Commit Crime," see Words & Phrases.]

7. Larceny ⚷56

A conviction of attempted grand theft of automobile belonging to owner from whom defendant at 1 o'clock in the morning had demanded production of driver's license, accompanied by threat to shoot owner as owner backed away from curb at which automobile had just been parked, was authorized as against contention that corpus delicti was not established.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Woodrow W. Harvey, alias George Vanatta, and Ed Cole, were convicted of attempted grand theft, and Cole appeals from judgment and order denying motion for new trial, whereas Vanatta appeals solely from judgment of conviction.

Judgment relative to George Vanatta reversed. Judgment and order as to Ed Cole affirmed.

W. Thomas Davis, of Los Angeles, for appellant Woodrow W. Harvey.

Frederic H. Vercoe, Public Defender, of Los Angeles, for appellant Ed Cole.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

McCOMB, Justice.

Defendants were convicted after trial by the court without a jury of attempted grand theft. Defendant Cole appeals from the judgment and order denying his motion for a new trial, while defendant Vanatta appeals solely from the judgment of conviction.

[1] Viewing the evidence most favorable to the prosecution (respondent), the facts in the instant case are:

August 22, 1937, about 1 a. m., Mr. Rosenbaum parked his automobile in front of his home in the city of Los Angeles, and, as he stepped from it, defendant Cole yelled at him, "Let me see your driver's license." Mr. Rosenbaum asked defendant Cole why he wanted to see his license. He replied that he wanted to check to see if the automobile belonged to Mr. Rosenbaum. He further stated he was an officer, and on being asked to produce his badge pulled a flashlight from his pocket and held it in front of Mr. Rosenbaum's face in such a manner that he could not see. As Mr. Rosenbaum started backing away from defendant Cole into the street, this defendant said, "I've got you covered. Don't you run; I'll shoot you and might kill you." As he made this statement he placed his right hand in his coat pocket. At this juncture an automobile approaching in the street stopped and defendant Cole left the scene.

Defendant Vanatta stated to a police officer some hours later that he and his codefendant had held up a couple of automobiles early in the evening.

A.

[2, 3] Each defendant urges reversal of the judgment on the ground that *the evidence is insufficient to sustain the judgment.* We have examined the record and find there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn from the facts set forth above to fully justify the trial court in finding that defendant Cole committed the crime of attempted grand theft on August 22, 1937.

[4] With reference to defendant Vanatta we find a different situation. There is a paucity of evidence in any way connecting him with the offense of which he was convicted. Mr. Rosenbaum testified that at the time he was stopped by defendant Cole there was no other person present and in addition that the first time he saw defendant Vanatta was later in the custody of police officers. Therefore, the sole testimony of an incriminating nature against defendant Vanatta was his statement to the police officers that during the evening of August 22, 1937, he in company with his codefendant had attempted to hold up several automobiles. This evidence is obviously totally insufficient to sustain the charge of attempted grand theft from Mr. Rosenbaum. For aught that appears at the time of the transaction described above defendant Vanatta may have been in the custody of the police officers.

As the judgment against defendant Vanatta must be reversed for the foregoing reasons, it is unnecessary for us to consider the other contentions advanced by him.

B.

[5] Defendant Cole relies for reversal of the judgment on this additional proposition:

The corpus delicti of attempted grand theft was not established.

This proposition is untenable. To constitute the corpus delicti of grand theft there must be (1) a person from whom the property may be taken, (2) an intent to take such property against the will of the owner, and (3) an act performed tending to accomplish the foregoing. People v. Paluma, 18 Cal.App. 131, 132, 122 P. 431.

[6] It is likewise settled that if the actual transaction has commenced which would have ended in the crime if not interrupted there is clearly an attempt to commit the crime. People v. Paluma, 18 Cal.App. 131, 133, 122 P. 431.

[7] It is apparent from an examination of the facts stated above that all of the necessary elements to establish the corpus delicti of the crime of attempted grand theft were present in the instant case.

The judgment relative to George Vanatta is reversed.

The judgment and order as to defendant Cole are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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25 Cal.App.2d 411

PEOPLE v. GOTTLIEB et al.

Cr. 3072.

District Court of Appeal, Second District, Division 1, California.

March 18, 1938.

1. Criminal law 🔑274

A defendant who admitted his guilt of felony not only at time of pleas to the probation officer but also upon hearing of motion to vacate conviction was not entitled to withdraw his pleas of guilt so as to be in a position to receive probation because of alleged fraud practiced upon him in obtaining the plea, since fact that defendant did not receive a milder punishment than expected and that he entered his plea solely on the advice of his counsel did not indicate fraud. Pen. Code § 859a, as added by St.1935, p. 492; § 1203, as amended by St.1935, p. 1706.

2. Criminal law 🔑274

A motion to vacate a judgment and set aside plea of guilty may only be resorted to where, on account of duress, fraud, or force overreaching the free will and judgment of an accused, he is deprived of the right to a trial on the merits.

3. Criminal law 🔑274

That an accused did not receive a milder punishment by pleading guilty than that which he thought he might receive if he stood trial, or that accused might receive a milder punishment for other crimes if his plea of guilty to a particular offense were set aside, presents no ground for the exercise of discretion necessary to permit a plea of guilty to be withdrawn.

4. Criminal law 🔑274, 998

The rule that a judgment may be vacated and a plea of guilty, which was obtained by fraud, set aside, may be utilized only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Julius L. Gottlieb and Kenneth Smith were charged with burglary, grand theft, and attempted robberies, and Kenneth Smith was convicted of burglary in the second degree, grand theft, and attempted robbery, and he appeals.

Affirmed.

Joseph O. Morris, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

WHITE, Justice.

In a complaint filed in the justice's court of Pasadena township, appellant was accused of the crimes of burglary, grand theft, and attempted robberies, all felonies, and pleaded as counts I, II, III, and IV, respectively, in said complaint. The record shows that upon his arraignment before the magistrate on October 1, 1937, appellant was represented by counsel; that the magistrate delivered to appellant a copy of the complaint and informed him of his right to the aid of counsel, whereupon appellant informed the court of the name and presence of his counsel. The record further shows that thereupon the magistrate read the complaint in question to appellant and inquired of him whether he pleaded guilty to the offenses charged, section 859a, Pen.Code, as added by St.1935, p. 492, or whether he desired to have a preliminary examination thereon. The record discloses further that appellant thereupon, in the presence of his counsel, and with the consent of the magistrate and the district attorney, pleaded guilty to the offenses charged in counts I, II, and III, while count IV was dismissed on motion of the district attorney. The committing magistrate then certified the cause to the superior court of Los Angeles county. On October 4, appellant appeared before the superior court without counsel, and the public defender was appointed to represent him. Thereupon, appellant orally applied for probation, and hearing thereon, as well as the pronouncing of judgment and sentence, was continued to October 18. On the last-named date appellant, accompanied by his counsel, again appeared in the superior court, at which time the court found the burglary charged in count I to be burglary in the second degree, denied appellant's application for probation, and pronounced concurrent judgments committing appellant to state prison on each of the three felonies. On November 8, appellant filed a "Notice of Motion to Open Judgment," by which application was made to the court for an order "vacating and setting aside said judgment and permitting the said Kenneth Smith to defend the said action in so far as count III of said information is concerned." Upon the same day, this motion was argued and by the court denied. Execution of the sentence was stayed for thirty days.

On December 10 another petition was filed by appellant asking for the same relief as that sought in the previous petition of November 8. In support of these petitions there were filed an affidavit and two letters attesting to the previous good character of appellant, calling attention to his youth, and otherwise setting forth reasons why in the opinion of the affiant and the writers of the letters, leniency should be extended to appellant. In his petition appellant averred that he was but twenty-one years of age; had never before been charged with any criminal offense; that he was living with his parents, and since leaving school had regularly contributed toward the support of his parents and three younger children in the family; that he had made application for a position as a truck driver, but was advised by his physician that it would be dangerous for him to assume such a position until he had first been operated upon for threatened appendicitis, which operation would cost $100; that he was aware of the financial inability of himself and his family to pay for such operation; that by reason of the foregoing, when he became acquainted with his codefendant, who was an ex-convict, he "came under the malign influence of the codefendant, Julius L. Gottlieb, and was induced to adopt and follow the supposedly shorter and easier way of obtaining the funds required to meet the exigencies which confronted him."

The petition then proceeds to allege:

"That upon being arrested, he was advised by the arresting officers, and who later had charge of the investigation of the case, and before he was required to plead, to confess and give the officers all the facts and plead guilty. He was influenced by the belief that it would go easier with him if he so confessed and plead guilty. He thereupon made a full disclosure not only of certain offenses regarding which the said officers were then inquiring, but also revealed other offenses of which the said officers had no prior intimation or knowledge.

"* * * That in due time he was taken by a police officer to the Security Building in the City of Pasadena, California, and without his request taken into the office of a lawyer on the second floor of said Security Building, who looked over the written charges against him and without asking him any questions or giving him any opportunity to volunteer any information regarding the said charges, went with him and the officer or officers into the court room of Justice William E. Fox, and there told him to plead guilty to the said charges.

"* * * That it was petitioner's first experience in appearing before a magistrate, that he was unacquainted with the rules and procedure involved in such matters, that he had not previously consulted nor had the advice of any counsel, that he was confused and abashed by the novel experience, and therefore at the suggestion of said lawyer pleaded guilty to all of the charges involved."

The petition of December 10 was denied, and from the order of denial appellant prosecutes this appeal.

From a reading of the transcript in this case, it is apparent that the trial court was of the belief that the case was one warranting leniency, but because at the time of the commission of the offense charged in count III, around which the petition centers, appellant was armed with a deadly weapon, probation was prohibited, under the provisions of section 1203 of the Penal Code, as amended by St.1935, p. 1706. From the proceedings had before the lower court on the hearing of appellant's petition, it appears that the main, if not the only, purpose of this application to set aside the guilty plea as to count III and for leave to enter a plea of not guilty, was to permit the district attorney to dismiss count III, thereby, according to appellant, placing him in a position where probation could be granted on counts I and II, a proposal to which, as the record indicates, the district attorney was not averse.

[1-3] While the averments contained in appellant's petition might well constitute a persuasive plea for executive clemency, they furnish no ground for holding that the court erred in denying the relief sought. It is well settled in this state that this procedure to set aside a judgment after plea of guilty may only be resorted to where, on account of duress, fraud, or other force overreaching the free will and judgment of a defendant, he is deprived of the right to a trial on the merits. People v. Aseltine, 139 Cal.App. 768, 770, 34 P.2d 830. The fact that a defendant did not receive a milder punishment by pleading guilty than that which he thought might be meted out to him if he stood trial, or the fact, as in the instant case, that the defendant might be placed in a position to receive a milder punishment for other crimes if his plea of guilty to a particular offense were set aside, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A.L.R. 1441. Neither does it avail appellant anything that he entered his plea solely on the advice of his counsel representing him in the case, because this falls far short of being a fraudulently obtained plea. It is not at all parallel to the situation disclosed in People v. Schwarz, 201 Cal. 309, 257 P. 71, relied upon by appellant here.

[4] Having admitted his guilt, not only at the time of his pleas and to the probation officer, but also upon the hearing of his motion to vacate the judgment, how can appellant now be heard to say that fraud was practiced upon him resulting in a denial of his legal rights? The exceptional remedy above referred to was not designed to enable the guilty to escape punishment, but to purify and keep pure the administration of justice, and the same may be utilized only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes.

The order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

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25 Cal.App.2d 346

LOFTIS, Sheriff, et al. v. SUPERIOR COURT IN AND FOR KINGS COUNTY et al.

Civ. 2216.

District Court of Appeal, Fourth District, California.

March 15, 1938.

Hearing Denied by Supreme Court May 12, 1938.

1. Prohibition 🔑3(2)

A judgment of a superior court will not be reviewed in proceedings for a writ of prohibition where the right of appeal from the judgment exists.

2. Appeal and error 🔑477

The superior court may by order hold the parties in status quo pending an appeal from its judgment.

3. Prohibition 🔑11

"Prohibition" will not lie to restrain mere errors by the court below as its office is to prevent acts in excess of jurisdiction only.

[Ed. Note.—For other definitions of "Prohibition (Writ of)," see Words & Phrases.]

4. Constitutional law 🔑55

A statute forbidding the issuance of injunctions to prevent the execution of public statutes by public officers is not a legislative invasion of the functions of the judiciary, since statute merely enunciates a generally recognized rule of equity jurisdiction. Code Civ.Proc. § 526, 2d subd. 4; Civ.Code, § 3423.

5. Prohibition 🔑3(1)

Prohibition will not lie to restrain an act in excess of the jurisdiction of the court below if there is a plain, speedy, and adequate remedy in the ordinary course of law.

6. Prohibition 🔑5(2)

Prohibition will not issue to prevent the enforcement of an injunction against an official unless the official act enjoined is required of the officer by a valid, existing, and constitutional statute. Code Civ.Proc. § 526, 2d subd. 4; Civ.Code, § 3423.

7. Animals 🔑29

An order placing all counties of the state in bovine tuberculosis control areas under state control automatically terminated a voluntary tuberculosis control area created by county ordinance together with all duties imposed and powers given by that ordinance. St.1933, p. 97, § 221 et seq., as amended; p. 99, § 234.25.

8. Injunction 🔑76

The performance of duties imposed on county live stock inspector by county ordinance creating a voluntary bovine tuberculosis control area could be enjoined after all of the counties of the state were placed in tuberculosis control areas under state authority since inspector was not a state official as his authority emanated from ordinance rather than from enabling statutory and constitutional provisions. St.1933, p. 97, § 221 et seq., as amended; p. 99, § 234.25; Civ.Code, § 3423; Code Civ.Proc. § 526, 2d subd. 4; Const. art. 11, § 11.

9. Injunction 🔑75

The director of the state department of agriculture and the head of the department of animal industry could not be enjoined from enforcing provisions of the Agricultural Code relating to bovine tuberculosis in county which came under state's control after having operated as a voluntary control area, since they were "state officers" performing duties for the benefit of the public under a valid law. St.1933, p. 97, § 221 et seq., as amended; p. 99, § 234.25; Civ.Code, § 3423; Code Civ.Proc. § 526, 2d subd. 4; Const. art. 11, § 11.

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

10. Injunction 🔑76

A district attorney and a county sheriff could not be enjoined from performing duties imposed on them in connection with bovine tuberculosis control in county which came under state's control after having operated as a voluntary tuberculosis control area. Civ.Code, § 3423; Code Civ.Proc. § 526, 2d subd. 4; St.1933, p. 61, § 7; p. 91, § 181 et seq., as amended; p. 97, § 221 et seq., as amended; p. 99, § 234.25; Const. art. 11, § 11.

11. Judgment 🔑829(3)

A judgment of a federal court rendered in a case in which the right of cattle owners to an injunction restraining the killing of tuberculous cattle was denied was not determinative of issue raised by application for prohibition to enjoin a superior court from enforcing its order restraining petitioners from slaughtering tuberculous cattle pending an appeal from judgment of the superior court entered after sustaining a demurrer to cattle owners' complaint without leave to amend, although res judicata might have been a defense to the action in the district court.

12. Animals 🔑29

A county voluntary bovine tuberculosis control area is an entity separate and distinct from a state tuberculosis control area. St.1933, p. 97, § 221 et seq., as amended.

13. Animals 🔑29

A statute prohibiting application of a tuberculin test to any bovine which has been found to be a reactor applies to state tuberculosis control areas only and does not apply to reactors found and tested in a county voluntary tuberculosis control area. St.1933, p. 99, § 230.

14. Statutes 🔑181(2)

Where reasonably possible, a law should be construed to reach a result that is reasonable and which was intended by the legislators enacting it.

15. Prohibition 🔑3(3)

The District Court of Appeal was authorized to review, in proceedings for prohibition, an order of the superior court of Kings county restraining certain state and county officials from proceeding with the slaughter of tuberculous cattle which had been proven reactors prior to date upon which all counties of the state were placed in tuberculosis control areas under state authority, pending an appeal from judgment of the superior court entered after sustaining a demurrer to complaint of the cattle owners without leave to amend. Civ.Code, § 3423; Code Civ.Proc. § 526, 2d subd. 4; St.1933, p. 97, § 221 et seq., as amended.

◆

Proceeding for a writ of prohibition by Luther P. Loftis individually and as sheriff of the county of Kings, and others against the Superior Court of the state of California, in and for the county of Kings, and the Honorable K. Van Zante, judge of the court, to restrain defendants from enforcing a restraining order prohibiting petitioners from slaughtering tuberculous cattle in Kings county.

Petition of William C. Truckell denied; petition of remaining petitioners granted.

U. S. Webb, Atty. Gen., Lucas E. Kilkenny, Deputy Atty. Gen., and Roger R. Walch, Dist. Atty. of Kings County, of Hanford, for petitioners.

J. L. Royle, of Fresno, for respondents.

MARKS, Justice.

An alternative writ of prohibition was issued by the Supreme Court and made returnable here. Petitioners seek to cause respondents to refrain and desist from enforcing a restraining order prohibiting petitioners from slaughtering or doing any act leading to the slaughtering of certain tuberculous cattle in Kings county.

Manuel S. Brown, and sixteen other owners of cattle, brought an action in the Superior Court of Kings county to restrain defendants in that action, petitioners here, from proceeding with the slaughter of their cattle to which had been administered the tuberculin test and which had been proven to be reactors. The defendants in that action demurred because of lack of jurisdiction of the Superior Court. The demurrer was sustained without leave to amend. However, that court did make the following order:

"It is further ordered that each and all of the defendants, their agents, servants and employees, and all persons acting under them, be and they are hereby restrained from in any manner slaughtering or doing any act leading up to the slaughter or disposition of any of the cattle belonging to any of these plaintiffs, being the subject-matter of this action, pending the appeal herein."

This is the order placed in issue here.

Luther P. Loftis is sheriff, Roger R. Walch is district attorney, and William C. Truckell is live stock inspector of Kings county. A. A. Brock is director of the department of agriculture and C. U. Duckworth is head of the department of animal industry of the state of California. We will refer to them, in the order named, as the sheriff, the district attorney, the inspector, the director and the head of the department.

In 1933 the Legislature adopted an Agricultural Code for this state. Stats.1933, p. 60. Amended, affecting question here, Stats. 1935, p. 1611; Stats.1937, pp. 1991, 2209. Article 3, c. 3, div. 2, § 221 et seq., Stats. 1933, p. 97, as amended, of this code contains provisions for the control of bovine tuberculosis in California. Two principal methods of control are provided for. One is the establishment of tuberculosis control areas under the general direction of the state department of agriculture. The other is the establishment of voluntary tuberculosis control areas by boards of supervisors of counties. Section 234.25, Agricultural Code, St.1933, p. 99. This section provides that a voluntary tuberculosis control area shall cease to exist when its territory is taken over as a tuberculosis control area by the state.

In November, 1934, the board of supervisors of Kings county passed its ordinance No. 158 organizing all of that county into a voluntary tuberculosis control area. The officials of the county began enforcing the provisions of the ordinance which followed closely those of the Agricultural Code governing tuberculosis control areas except that no payment would be made by the county for the reactors slaughtered. Shortly thereafter a group of dairymen commenced legal proceedings contesting the enforcement of the ordinance. Its provisions were upheld by this court. Coelho v. Truckell, 9 Cal.App.2d 47, 48 P.2d 697. This decision has been modified in one particular, not important here, in Stanislaus County Dairymen's Protective Association v. County of Stanislaus, 8 Cal.2d 378, 65 P.2d 1305.

On February 14, 1936, an action in equity was filed in the United States District Court for the Southern District of California seeking to enjoin the officials of Kings county and the directors from proceeding under the ordinance because of its alleged unconstitutionality under the due process and equal protection of the law clauses of the Federal Constitution. Const.U.S.Amend. 14. As an additional ground for invoking the jurisdiction of the federal courts, it was alleged that the complainants were citizens of the republic of Portugal, resident in Kings county. The United States District Court in this case, Borges et al. v. Loftis et al., denied the injunction and upheld the constitutionality of the ordinance. This decision was sustained by the United States Circuit Court of Appeals for the Ninth Circuit on January 18, 1937. 87 F.2d 734. The United States Supreme Court declined to review the judgment on April 26, 1937. 301 U.S. 687, 57 S.Ct. 789, 81 L.Ed. 1344.

Thereafter, in 1937, a group of dairymen of Kings county (a number, if not all of them, had been complainants in the Borges Case) instituted another action in the United States District Court for the Southern District of California (Avila et al. v. Walch et al.) again attacking the constitutionality of the Kings county ordinance and seeking to enjoin all of the petitioners here from enforcing its provisions. The decree in equity in that case contained the following:

"Now therefore, it is ordered, adjudged and decreed that the defendant county officers are entitled to slaughter all such dairy cattle belonging to any of the complainants as have reacted positively to the tuberculin test prior to the commencement of this suit, and none other, provided that thereafter the complainants shall be entitled to conduct a post mortem of such destroyed cattle.

"It is further ordered, adjudged and decreed that the defendant county officials have no authority to test or brand or slaughter any other cattle belonging to any of the complainants."

The United States District Court denied application for injunction and dismissed the bill in equity. In January, 1938, the United States Circuit Court of Appeals for the Ninth Circuit denied complainants the right of appeal from that judgment.

By an order effective on August 2, 1937, the director placed all of the counties of the state in tuberculosis control areas under state authority. This order automatically terminated the voluntary tuberculosis control area created under the Kings county ordinance. Section 234.25, Agricultural Code, St.1933, p. 99. The effect of the situation created by this order was before the United States District Court in the Avila Case and was considered there in the findings of fact. It was necessarily involved in and decided by the decree in equity.

On January 18, 1938, Manuel S. Brown and his cocomplainants brought the action in the Superior Court of Kings county to restrain these petitioners from slaughtering the cattle that had been tested and found to be reactors under the county ordinance prior to August 2, 1937. The defendants in that action (petitioners here) raised by demurrer the question of the jurisdiction of the Superior Court of Kings county. The demurrer was sustained without leave to amend and the Superior Court made the order under attack here which we have already quoted.

It should be observed that some, if not all, of the plaintiffs in this last Kings county Superior Court action were complainants in the case of Borges et al. v. Loftis et al., and all of them, with others, were complainants in the case of Avila et al. v. Walch et al. The defendants in the Borges Case were the director and three Kings county officials. They are four of the five defendants in the last Kings county Superior Court action, and petitioners here. The defendants in the Avila Case were the identical defendants in the last Kings county Superior Court case and are the petitioners here.

The serious question presented here is our right to review the order of the Superior Court of Kings county restraining petitioners from proceeding with the slaughter of the tuberculous cattle which had been proven reactors prior to August 2, 1937, pending an appeal from the judgment of that court entered after sustaining the demurrer to the complaint without leave to amend.

[1, 2] It is a general rule that a judgment of a superior court will not be reviewed in proceedings for a writ of prohibition where the right of appeal from the judgment exists, as usually the right of appeal is held to afford an aggrieved party a plain, speedy, and adequate remedy, making resort to prohibition unnecessary and improper. It has also been held that, pending appeal from its judgment, the superior court may by order hold the parties in status quo. Tulare Irrigation District v. Superior Court, 197 Cal. 649, 242 P. 725.

If we understand the position of respondents correctly, it may be summarized as follows: That the Constitution gives the Superior Court general jurisdiction in equity cases, which includes jurisdiction to grant or deny injunctive relief; that this general grant of equity jurisdiction includes the power to decide all questions in equity presented to it and to decide those questions rightly as well as wrongly; that a constitutional grant of jurisdiction cannot be limited by statute; that the provisions of paragraph 4 of the second division of section 526 of the Code of Civil Procedure providing that "an injunction cannot be granted: * * * 4. To prevent the execution of a public statute by officers of the law for the public benefit" (see, also, section 3423, Civ.Code) is a limitation on the exercise of jurisdiction and cannot be a limitation of jurisdiction itself which is conferred by the Constitution.

[3-5] This argument is not a new one. In solving this problem, we are required to follow the law established by the numerous cases that have already settled it in this state. In Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845, 849, the Supreme Court said:

"The act being constitutional, and the injunction sought being one which contravenes the prohibition of section 3423 of the Civil Code, there still remains the question whether the superior court, in entertaining the application for such injunction, is exceeding its jurisdiction, and thus laying the foundation for a writ of prohibition. Such writ will not go to restrain mere errors by the court below. It is only an excess of jurisdiction which may be reached in this manner. This court has held, in Wright v. Superior Court, 139 Cal. 469, 73 P. 145, that a writ of prohibition would issue to arrest the action of a superior court which was undertaking to enjoin an action pending in another court in violation of the first subdivision of section 3423 of the Civil Code. In Glide v. Superior Court, 147 Cal. 21, 81 P. 225, a similar writ was based on the seventh subdivision of section 3423, which provides that an injunction cannot be granted 'to prevent a legislative act by a municipal corporation.'

"Section 3423 of the Civil Code does not in all of its provisions establish new rules for the granting or denying of preventive relief in equity. Some of the subdivisions are merely declaratory of principles which, in the absence of statute, were and are generally held to govern courts of chancery in determining what causes are proper subjects of equitable cognizance. Subdivision 1 is more than declaratory. It establishes a rule; it limits the right to issue injunctions as that right was understood in the English and American court before the adoption of our Codes. The Constitution of this state gives to the superior courts original jurisdiction 'in all cases in equity.' To the argument that this jurisdiction could not be limited by statute this court said in Spreckels v. Hawaiian etc. Co., 117 Cal. 377, 49 P. 353, and in Wright v. Superior Court, 139 Cal. 469, 73 P. 145, that subdivision 1 of section 3423 was an exercise of the legislative power to define the rights of persons. It did not limit the power of courts of equity to issue an injunction wherever the complaint was entitled thereto, but so operated on the complainant as to take away his right in certain cases to this form of relief. In the Wright Case, where, as we have said, a writ of prohibition was issued, the court held that the superior court was without jurisdiction to issue an injunction in a case in which such relief is forbidden by subdivision 1 of section 3423. The dissenting opinion of Shaw, J., took the ground that if, as the court held, the subdivision merely regulates the rights of persons, the issuance of a writ of injunction contrary to the statutory declaration is an erroneous determination that a cause of action exists, rather than an excess of jurisdiction. Whatever force this criticism may have, it is not applicable to the provision of subdivision 4 of section 3423. For here, in the subdivision declaring that injunction does not lie to restrain the execution of a legislative act by public officials, we have the enunciation of an old and generally recognized rule of equity jurisdiction.

"This rule, like that of subdivision 7, which was involved in Glide v. Superior Court, 147 Cal. 21, 81 P. 225, [supra] has its underlying basis in the division of the activities of government into three separate and independent departments, each of which is, in the exercise of its own peculiar functions, free from the control of either of the others. 5 Pom.Eq.Jur. § 327. The power to enjoin officers from enforcing a statute, even where the statute was claimed to be unconstitutional, has been denied in some cases. Kneedler v. Lane, 45 Pa. 238; Thompson v. Commissioners of Canal Fund, 2 Abb.Prac.(N.Y.) 248. This court has not carried the doctrine so far. The prohibition against enjoining the execution of statutes has been held to apply only to valid statutes. Wheeler v. Herbert, 152 Cal. 224, 92 P. 353. But, at least as so limited, the rule is generally recognized. In Southern Oregon Co. v. Quine, 70 Or. 63, 139 P. 332, the court said: 'We think the law is fixed beyond cavil that courts of equity have no power by injunction to restrain a public officer from performing an official act that he is required by valid law to perform. It is not sufficient to clothe the court with jurisdiction to say simply that, unless the court extends its restraining hand, hardships will follow, or irreparable damage will ensue, because the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief. The acts must be such as are without the sanction of a sound law.' See, also, Southern Min. Co. v. Lowe, 105 Ga. 352, 31 S.E. 191; Mendenhall v. Denham, 35 Fla. 250, 17 So. 561; Inhabitants of Greenville Tp. v. Seymour, 22 N.J.Eq. 458.

"Even though the lower tribunal is about to exceed its jurisdiction, the writ of prohibition will not lie where there is 'a plain, speedy and adequate remedy in the ordinary course of law.' Code Civ.Proc., § 1103. It is true that in the case at bar the petitioner might by appeal review the correctness of any judgment or order enjoining it, but we do not think that such appeal would, under the circumstances here described, be an adequate remedy. Glide v. Superior Court, 147 Cal. 21, 81 P. 225 [supra]." See, also, Davis v. Superior Court, 184 Cal. 691, 195 P. 390; A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Moore v. Superior Court, 6 Cal.2d 421, 57 P.2d 1314; Daugherty v. Superior Court, Cal.App., 74 P.2d 549.

[6] It is also well settled that before a writ of prohibition will issue to prevent the enforcement of an injunction against an official, the official act enjoined must have been required of the officer by a valid, existing, and constitutional statute. Reclamation District v. Superior Court, supra; Abe v. Fish and Game Commission, 9 Cal.App.2d 300, 49 P.2d 608. This presents the question of the effect of the termination of the Kings county voluntary tuberculosis control area on August 2, 1937, by the order of the director. As we find that duties are, or were, imposed by law upon petitioners by different enactments, we cannot consider their positions collectively.

[7] As a preliminary step in the solution of this question, we must weigh one argument of petitioners. They urge that as section 234.25 of the Agricultural Code, St.1933, p. 99, gives to the board of supervisors of a county the right and power to create a voluntary tuberculosis control area where its territory is not included in a state tuberculosis control area, the duties imposed on the county officials to enforce the provisions of the county ordinance are in fact duties imposed on these officers by section 234.25 of the Agricultural Code and are, therefore, continuing duties imposed by law to which the prohibition by injunction will not lie.

We cannot agree with this argument. The power of county officials to create a voluntary tuberculosis control area is drawn from section 11, article 11, of the Constitution and section 234.25 of the Agricultural Code. These are merely enabling acts and are not self-executing. They place no obligation on a board of supervisors to form a voluntary tuberculosis control area. The formation of such an area, as the name implies, is a voluntary act of that body. Until a board of supervisors acts, no such area is formed. A voluntary tuberculosis control area is an entity entirely separate and apart from a state tuberculosis control area. Coelho v. Truckell, supra. During the life of the voluntary tuberculosis control area, it draws its vitality from, and county officers find their duties defined in, the ordinance and not in the state law.

The case of O'Neal v. Seabury, Cal.App., 74 P.2d 1082, 1083 is precisely in point and is decisive of this question. It was there said:

"Pursuant to the provisions of section 234.25 of the Code, St.1933, p. 99, the county of Madera thereupon established a tuberculosis control district including the entire territory of that county, and enacted ordinance No. 164, which is involved in this appeal.

"While the ordinance was in force this suit for injunction was brought against the defendants. Before the appeal in this case was submitted to this court for determination, pursuant to the authority conferred upon the agricultural department of the state of California by Division 2 of the Agricultural Code, St.1933, p. 74, § 100 et seq., that department of the state, on July 3, 1937, formally included the county of Madera within the general 'tuberculosis control area' of the state and thereby made it a part of the state district bringing the county of Madera under the exclusive control of the agricultural department of the state with respect to the inspection, segregation, and testing of beef and dairy cattle to eradicate tuberculosis therefrom. This act including Madera county in the state tubercular control area had the effect of abrogating the tubercular ordinance of that county, No. 164, which was involved on this appeal. * * * As the state tuberculosis control district now exists under the law, the defendants are powerless to enforce the Madera ordinance and an injunction becomes useless." It follows that all duties imposed, and powers given, by the Kings county ordinance ended on August 2, 1937.

[8] Petitioner William C. Truckell is live stock inspector of the county of Kings. He is not a state officer. The Agricultural Code imposes no duties upon him pertaining to the tubercular testing and slaughtering of bovines. He has no duties to perform in this connection under the provisions of the Agricultural Code or any other state law to which we have been cited. He can have no duties now imposed upon him by the Kings county ordinance as that ordinance became ineffective on August 2, 1937. It follows that since the restraining order of the respondents in question here did not restrain Truckell from performing a duty imposed upon him by any existing law, the Superior Court did not exceed its jurisdiction in restraining him from slaughtering cattle pending the appeal from the judgment of that court.

[9] Petitioners Brock and Duckworth are state officers. As soon as the county of Kings became a state tuberculosis control area, the primary duty of enforcing the provisions of the Agricultural Code relating to bovine tuberculosis in that county were placed on them. These duties are many and are made explicit by the statutes. That these provisions of law are for the benefit of the public cannot be doubted. It follows that it was an excess of jurisdiction on the part of respondents to restrain these officers from performing those duties enjoined upon them by an existing, effective, and valid state law. Patrick v. Riley, 209 Cal. 350, 287 P. 455.

[10] Petitioner Walch is district attorney of Kings county. Chapter 3, div. 2, § 181 et seq., of the Agricultural Code, St. 1933, p. 91, as amended, makes many acts of cattle owners crimes if any of them fail to conform to its requirements. Section 7 of the Agricultural Code, St.1933, p. 61, places the special duty upon a district attorney of prosecuting these crimes. These crimes include resistance of state officers slaughtering reactor cattle. He also has the general statutory duty of prosecuting crimes committed within his county. It follows that the order in question prohibits the district attorney from performing duties enjoined upon him by state law and cannot be upheld.

The petitioner Luther P. Loftis is sheriff of Kings county. As a peace officer, he has many duties in connection with keeping the peace and prosecution of crime, which duties are expressly placed upon him by law. These duties are too numerous and well known to need particularizing. The restraining order might well prohibit him from performing these duties should the director and head of the department proceed to perform their duties in Kings county under the state law. As to Loftis, the order in question may well prohibit him from performing these duties enjoined upon him by law and, therefore, is in excess of the jurisdiction of the Superior Court.

[11] Petitioners urge that all of the issues raised in the Kings county case in which the order in question was issued have been litigated in the federal courts and especially in the case of Avila et al. v. Walch et al.; that as those questions have been decided adversely to the cattle owners in the federal courts which had jurisdiction of the parties and the subject-matter of the action, they cannot be again litigated in the state courts. Were this an appeal after judgment rendered following trial where the defense of res adjudicata had been presented, this argument would have much weight. Such is not the case. This issue was not presented in any of the pleadings in the respondent court. It cannot serve here as a reason for issuing a writ of prohibition where we are only concerned with the question of jurisdiction to make the challenged order. Jurisdiction of respondents to make the order is not affected by the fact that res adjudicata might have been available as a defense to the action in Kings county at the trial if the issue were properly presented to the trial court.

[12] Our attention is especially called to section 230 of the Agricultural Code, St. 1933, p. 99, which provides as follows:

"It is unlawful to apply a tuberculin test to any bovine animal which has at any time been found by an approved veterinarian to be a reactor."

It is suggested that prior to August 2, 1937, several hundred cattle were tested under the county ordinance and found to be reactors; that the provisions of this section prohibit these cattle from being tested again and slaughtered under the provisions of the state law; that the conclusions we have reached will prohibit these reactors from being tested again and slaughtered; that they will continue to be milked and their milk sold in the state contrary to the public policy declared by the Legislature in the Agricultural Code.

We see no such dire and unfortunate results following our conclusions. As we have observed, a county voluntary tuberculosis control area is an entity separate and distinct from a state tuberculosis control area. Coelho v. Truckell, supra. They draw their powers from separate enactments. The officers administering these powers are not the same. Their territories cannot overlap because when the state moves in the county must move out of the field.

[13, 14] The section in question is found in the portion of the Agricultural Code dealing with state tuberculosis control areas. There is no such provision in the section dealing with county voluntary tuberculosis control areas. This section must be held to apply to state tuberculosis control areas only and to prohibit the retesting of reactors that have been tested by duly authorized state representatives in a state tuberculosis control area and not to reactors found and tested in a county voluntary tuberculosis control area. Any other construction placed upon the section would lead to the unreasonable result suggested by counsel. Where reasonably possible, a law should be construed to reach a result that is reasonable and which was intended by the legislators enacting it.

[15] In some instances, the tuberculin test of the reactors in Kings county may have been administered by duly authorized state representatives acting under county officials in the Kings county voluntary tuberculosis control area. If this has been done (the record here is silent on this question), there should be no good reason why the state officials should not proceed to have the reactors appraised and slaughtered as required by state law. If it has not been done and the reactors have not been tested by authorized state representatives, the state officials should proceed to retest these cattle and proceed as though there had been no former test under the county ordinance.

The petition of William C. Truckell for a writ of prohibition is denied and as to him alone the alternative writ is discharged.

The petition of Luther P. Loftis, Roger R. Walch, A. A. Brock, and C. U. Duckworth for a writ of prohibition is granted and as to them the writ will issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

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25 Cal.App.2d 422

SULLIVAN v. SHANNON.

Civ. 2140.

District Court of Appeal, Fourth District, California.

March 19, 1938.

1. Appeal and error 🔑518(1)

Where a plea of the statute of limitations is interposed by demurrer, complaint and date of its filing are important and necessary parts of the record, and a record which does not contain that information is deficient. Code Civ.Proc. § 337, as amended by St.1935, p. 1740.

2. Appeal and error 🔑916(1)

Where neither party questioned defect in record for failure to include information concerning complaint and date of its filing, though plea of limitations had been interposed by demurrer to complaint, and though demurrer had been sustained, and both parties stated in their briefs that complaint was filed on or about certain date, the District Court of Appeal would assume that complaint was filed on that date. Code Civ. Proc. § 337, as amended by St.1935, p. 1740.

3. Limitation of actions 🔑2(2)

Where mortgage and bond were executed in New York by a resident of that state, who thereafter removed to California, action brought in California on the bond was controlled by the California 4-year statute of limitations. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

4. Limitation of actions 🔑87(3)

Where a citizen of another state creates an obligation in writing in the state of his domicile, payable there, and removes his residence to California, California statute of limitations begins running in his favor when he removes to California. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

5. Limitation of actions ⚿51(2)

An automatic acceleration clause, being for benefit of payee, is not self-operative and may be waived, and hence until payee takes some action to set it in motion, it does not become operative on the happening of a default, as respects limitations.

6. Bills and notes ⚿129(2)

In New York, an automatic acceleration clause is self-operative, and without any action on part of payee, full amount of principal becomes immediately due on happening of default in accordance with express terms of contract.

7. Limitation of actions ⚿2(2)

Where mortgage and bond were executed in New York by a resident of that state, who thereafter moved to California, and action was brought in California on the bond, acceleration clause in bond was required to be interpreted under the laws of the state of New York, so that the unpaid principal would be deemed to have become due and payable on the happening of the default, from the date of which limitations would begin running. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

8. Limitation of actions ⚿180(2)

Before defense of limitations can be urged by way of demurrer, it must affirmatively appear from allegations of complaint that cause of action is barred by limitations. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

9. Limitation of actions ⚿177(2)

In action in California on bond executed by defendant while a resident of New York and before removing to California, wherein defendant interposed a demurrer to the complaint on ground that the 4-year California statute of limitations had barred the cause of action, plaintiff should have alleged, if such were a fact, that defendant had been absent from California a sufficient time during four years preceding the filing of the complaint to have tolled the statute of limitations. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

10. Pleading ⚿34(3)

A fact may appear from the allegations of a pleading by inference as well as by direct allegation.

11. Appeal and error ⚿917(3)

Where complaint in action on $7,500 bond made bond with its indorsements a part of complaint by reference, and indorsements showed payments of $5,500, the last of which was made on certain date, and alleged that unpaid principal was $2,000, court, in determining whether demurrer to complaint on ground that limitations had run, was properly sustained, would assume that last payment was made on date shown by last indorsement on bond. Code Civ.Proc. § 337, subd. 1, as amended by St.1935, p. 1740.

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Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Donald D. Sullivan against Horace T. Shannon to collect balance unpaid on a bond, together with accrued interest. From an order sustaining a demurrer to the amended complaint and from judgment entered against plaintiff when he declined to amend the complaint, the plaintiff appeals.

Attempted appeal from order dismissed, and judgment affirmed.

Charles R. Holton, of Whittier, for appellant.

Harold Richardson, of Whittier, for respondent.

MARKS, Justice.

This action was instituted to collect from defendant the sum of $2,000, principal, together with accrued interest, being a balance unpaid on a bond dated February 10, 1925, executed and made payable in New York. A demurrer to the amended complaint, on the ground that the cause of action was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure, as amended by St.1935, p. 1740, was sustained with leave to amend. Plaintiff declined to amend and has appealed from the judgment entered against him.

[1, 2] The amended complaint was filed on March 4, 1937. The original complaint is not in the record nor is the date of its filing. Where a plea of the statute of limitations is interposed by demurrer the complaint and the date of its filing are important and necessary parts of the record. A record which does not contain this information is deficient. Dougall v. Schulenberg, 101 Cal. 154, 35 P. 635. However, counsel for both parties state in their briefs that the complaint was filed "on or about" No-

vember 12, 1936. As the question of this defect in the record is not raised by either party, we will assume that the complaint was filed on that date.

The amended complaint alleges that on February 10, 1925, defendant executed and delivered to Robert J. Malone a mortgage on property in the city of Binghamton, county of Broome, state of New York, to secure the payment of $7,500. The principal was payable in semiannual installments of $500 each, commencing on August 1, 1926; the final payment falling due on August 1, 1933. The bond contained the following acceleration clause: "And it is hereby expressly agreed that the whole of said principal sum shall become due after default in the payment of any instalment of principal or interest, or any part thereof, for thirty days. * * * "

Malone died, his estate was administered, and the bond finally came into the ownership of plaintiff. The mortgage was given subject to a prior mortgage. The first mortgage was foreclosed and the entire property was taken for that debt.

The amended complaint contains the following allegations:

"That the defendant, Horace T. Shannon, is a resident of the County of Orange, State of California. * * *

"Plaintiff is informed and believes and therefore alleges the fact to be that the defendant, on the 10th day of February, 1925, the date upon which said mortgage and bond were executed, was a resident of the State of New York; that at a time known to defendant, but unknown to plaintiff, he removed to the State of California, and now resides therein. * * *

"That the said defendant, Horace T. Shannon, has failed to perform the condition of said bond, viz: has failed to pay or cause to be paid unto said mortgagee, or his successors or assigns, the just and full sum of Seven Thousand Five Hundred ($7,500) Dollars, together with interest as in said bond provided, and there is now due, owing and unpaid unto the said plaintiff herein, the sum of Two Thousand ($2,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from the 1st day of February, 1933, from the said defendant, Horace T. Shannon. * * * "

There are no other allegations of the residence of defendant nor of the payments on the bond, except the indorsements on a copy of that instrument which is set forth in full and made a part of the pleading by reference. Those indorsements show that eleven semiannual payments of $500 each were made on the principal of the bond; the first on August 5, 1926, and the last on September 14, 1931.

[3, 4] It is, of course, admitted that the California statute of limitations of four years, as amended by St.1935, p. 1740, subdivision 1, § 337, Code Civ.Proc. controls this action as it is pending in a California court. Miller v. Lane, 160 Cal. 90, 116 P. 58. It is well settled here that where a citizen of another state creates an obligation in writing in the state of his domicile, payable there, and removes his residence to this state, the California statute of limitations starts running in his favor when he removes to this state. Dougall v. Schulenberg, supra; Chappell v. Thompson, 21 Cal. App. 136, 131 P. 82; McKee v. Dodd, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82.

[5, 6] The first serious question presented for our consideration is whether the California rule or the New York rule of construction of an acceleration clause such as we have quoted must control here. In this state, and we believe in a majority of the states, Keene Five Cent Savings Bank v. Reid, 8 Cir., 123 F. 221, it is held that an automatic acceleration clause is not self-operative; that it is for the benefit of the payee and may be waived; that he must take some action to set it in motion; that without such action on his part it does not become operative and the full amount of the principal will not become immediately due merely on the happening of a default. Belloc v. Davis, 38 Cal. 242. In New York the contrary rule prevails and the full amount of the principal becomes immediately due on the happening of the default in accordance with the express terms of the contract. Banzer v. Richter, 68 Misc. 192, 123 N.Y.S. 678; Id., 146 App.Div. 913, 131 N.Y.S. 1103. If the California rule is to be applied, the whole debt was not barred on November 12, 1936, and the demurrer was wrongfully sustained. Trigg v. Arnott, Cal.App., 71 P.2d 330. If the New York rule is controlling, the entire debt became due on February 1, 1932, if not before.

In Utah State National Bank v. Smith, 180 Cal. 1, 179 P. 160, the Supreme Court had before it the construction of a promissory note drawn in Utah and made payable there. The ultimate question for decision was whether the note was a negotiable instrument. This involved a decision of the question of when the note, by its terms, became due, which is the same question presented in the instant case. The Supreme Court held that the due date of the note was to be determined under the laws of Utah and not under the laws of California.

In Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 191, 57 A.L.R. 696, it is said: "It is a well-recognized principle of law in this state, as well as other jurisdictions, that the law of the place where a contract is made determines its validity. This rule is well and succinctly stated, as follows: 'The validity and construction of a contract are determined by the law of the place where it is made. Accordingly, it is quite generally held that a contract valid in the place where made is valid everywhere; and that a contract invalid where made is invalid everywhere; and the validity or invalidity of a contract so determined will, on principles of comity, be recognized wherever it is sought to be enforced, even though the law of the forum would have determined otherwise if applied.' 5 Cal.Jur. 449. To the same effect is 11 Corpus Juris, page 422. See, also Fenton v. Edwards & Johnson, 126 Cal. 43, 58 P. 320, 77 Am.St.Rep. 141, 46 L.R.A. 832; Platner v. Vincent, 187 Cal. 443, 202 P. 655; Pinney v. Nelson, 183 U. S. 144, 22 S.Ct. 52, 46 L.Ed. 125; Hervey v. Rhode Island Locomotive Works, 93 U.S. 664, 23 L.Ed. 1003 [see, also, Rose's U. S. Notes]; Thomas on Chattel Mortgages, 320; Jones on Chattel Mortgages, 301."

The following cases hold that a promissory note must be interpreted according to the laws of the state where its obligation is to be performed. McKee v. Dodd, supra; Navajo County Bank v. Dolson, 163 Cal. 485, 126 P. 153, 41 L.R.A.,N.S., 787. See, also, Pratt v. Dittmer, 51 Cal.App. 512, 197 P. 365; Luikart v. McDonald, 11 Cal.App. 2d 433, 53 P.2d 1012. There is nothing contrary to this conclusion in Andrews v. Zook, 125 Cal.App. 19, 13 P.2d 518. The laws of Iowa, where the contract involved in that case was made, are not discussed in the opinion.

[7] We, therefore, conclude that the acceleration clause in the bond before us must be interpreted under the laws of the state of New York, and that the unpaid principal became due and payable on the happening of the default of February 1, 1932, if not before, which was more than four years before this action was instituted.

[8] Counsel for plaintiff invokes the familiar and well-established rule that it must affirmatively appear from the allegations of a complaint that the cause of action is barred by the statute of limitations before that defense can be urged by way of demurrer. He urges (1) that it cannot be ascertained from the amended complaint that defendant had resided in California for four years prior to the institution of this action, and (2) that it cannot be ascertained from that pleading that the unpaid balance of the principal of the bond became due and payable more than four years prior to the filing of the complaint.

The case of Bass v. Berry, 51 Cal. 264, was an action on a promissory note executed in the state of New York. The defendant pleaded the statute of limitations by way of demurrer which was sustained. Plaintiff declined to amend and appealed from the judgment rendered against him. The judgment was affirmed on appeal. That case was cited with approval in Pleasant v. Samuels, 114 Cal. 34, 45 P. 998, 999, where it was said: "Where an action is brought upon a promissory note by the payee or an indorsee against the maker, and it appears that the note had matured more than four years before the commencement of the suit, the defense of the statute of limitations may be set up by demurrer. In such a case the complaint shows the exact time at which the cause of action arose, and, if it appears upon the face of the complaint that the statutory period of limitation has elapsed before the commencement of the action, the plaintiff, if he desires to escape the bar of the statute, must allege some fact which has prevented the running of said statute. This has been held a number of times by this court, particularly in Smith v. Richmond, 19 Cal. 476, where it was held that, when a new promise is relied upon, it must be alleged, and in Bass v. Berry, 51 Cal. 264, where it was said: 'The action being founded upon an instrument in writing, executed out of the state, the statutory bar of two years presumptively applies. If the plaintiff's case could be relieved in this respect by the fact of the absence of the defendant from the state, that fact should have been averred in the complaint.'" To the same effect is Littlepage v. Morck, 120 Cal.App. 88, 7 P.2d 716.

[9] From the foregoing authorities we conclude that plaintiff should have alleged, if such were the fact, that defendant had been absent from California for a sufficient

time during the four years preceding the filing of the complaint to have tolled the statute of limitations. In the absence of such allegation the amended complaint was vulnerable to the plea of the statute of limitations interposed by the demurrer of defendant.

[10, 11] In making his second argument that the time of default cannot be ascertained from the allegations of the amended complaint, counsel overlooks the plain allegations of that pleading. A copy of the bond with its indorsements was attached to the amended complaint and made a part of it by reference. Those indorsements show that eleven payments of $500 each had been made on the principal of the note, or a total of $5,500. The date of each payment is also shown. The amended complaint alleges an unpaid principal balance of $2,000. The total debt was $7,500. In effect the pleading alleged that each principal payment was made on each respective date set forth in the exhibit, or that the last principal payment was made on September 14, 1931. "A fact may appear [from the allegations of a pleading] by inference as well as by direct allegation." United Bank & Trust Co. v. Fidelity & Deposit Co., 204 Cal. 460, 268 P. 907, 909. We have here direct allegations of payments made, and balance unpaid, from which we may determine by mathematical calculation that the payments indorsed on the bond were all the payments made on the principal, and that the last principal payment was made on September 14, 1931.

The attempted appeal from the order sustaining the demurrer is dismissed. The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

KEY NUMBER SYSTEM

25 Cal.App.2d 399

PEOPLE v. RASMUSSEN.

Cr. 3044.

District Court of Appeal, Second District, Division 1, California.
March 17, 1938.

1. Criminal law 🔑1023(10)

An appeal from sentence entered after conviction was dismissed, since there is no appeal from sentence rendered.

2. Rape 🔑57(1)

In prosecution for forcible rape, whether prosecutrix was in fear of her life was question for jury.

3. Rape 🔑51(4)

Evidence *held* sufficient to justify conviction for forcible rape.

4. Criminal law 🔑807(2)

In prosecution for forcible rape, a failure to give instruction that charge of rape was easy to make and hard to disprove, and that jury should bear in mind difficulty of defense against such charge and carefully consider all evidence and instructions in arriving at verdict, was not reversible error, especially in absence of showing of prejudice to defendant since instruction was purely argumentative.

5. Assault and battery 🔑96(1)

In prosecution for forcible rape, instruction to find defendant guilty of criminal assault only under certain circumstances was properly refused under evidence.

6. Criminal law 🔑1171(1)

In prosecution for forcible rape wherein prosecutrix testified that defendant had referred repeatedly to his "weeds," conduct of district attorney in asking defendant what marihuana looked like, was not reversible error, although question was improper in form in which it was put in absence of showing on face of record or by defendant of way in which question could have acted to his prejudice.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Otto R. Rasmussen was convicted of forcible rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan and Arthur L. Veitch, Deputy Dist. Attys., all of Los Angeles, for the People.

YORK, Presiding Justice.

[1] The defendant and appellant was charged in an information filed by the district attorney of Los Angeles county with the crime of forcible rape. He was convicted by a jury, and after his motion for new trial was denied by the trial court,

the court pronounced judgment and sentence. The appellant attempts to appeal not only from the order denying his motion for a new trial, but also from the "judgment and sentence" entered by the court. There is, of course, no appeal from the sentence rendered, and this appeal from the sentence is dismissed.

[2,3] The main argument of appellant is that the testimony is inherently improbable, and therefore that the evidence is insufficient, and does not sustain the verdict. The testimony of the prosecutrix in this case, if believed by the jury, was amply sufficient to show not only the commission of the offense charged, but also of kidnaping. Whether or not the prosecutrix was in fear of her life was a question solely for the jury to determine; and the failure of the prosecutrix to resist and to call out and make her plight known to people who were seen by her shortly after the first attack is reasonably explained by her testimony as to her fear of the defendant and his threats of death. This was borne out by her complaint immediately when she got away from his custody. As to the second act of intercourse, the defendant, in referring thereto, stated that he "took it away from her." He also testified that the first act of intercourse was with her consent; and in appellant's brief we are asked to hold that the prosecutrix testified falsely when she testified that there were two acts of intercourse and that it was inherently improbable that such acts occurred. An examination of the entire evidence does not show in our mind any inherent improbability in the testimony of the prosecuting witness.

The appellant objects to the failure of the court to give an instruction as follows: "You are instructed that the charge of rape is, in its nature, a most heinous one, likely to create a strong prejudice against the accused. It is a charge easy to make and hard to disprove. On this account you should bear in mind the difficulty of defending against such charge, and consider most carefully all the evidence and the instructions in making up your verdict."

[4] This is an instruction that is purely argumentative, and there is no argument advanced as to how the defendant could have suffered any harm by failure to give such an instruction. It was held in People v. Foster, 117 Cal.App. 439, 4 P.2d 173, that such an instruction was merely an argument and not a statement of an instruction which should be given to a jury. To say the least, the failure to give such a cautionary instruction would not constitute a reversible error.

[5] The objection of appellant that another instruction should have been given to find the defendant guilty of simple assault only under certain circumstances, is of no point in the given case, as there is no evidence warranting a verdict of simple assault.

[6] The third point raised by appellant is as to the conduct of the district attorney in asking the defendant what marihuana looked like. Evidently this question was asked because of the testimony of the prosecutrix that several times the defendant asked, "Where are my weeds?" or referred to "weeds." It was not a proper question, at least in the form in which it was put; but there is nothing on the face of the record that shows any possible prejudice to the defendant, and in fact the defendant has failed to point out in what way the question complained of could have acted to his prejudice.

The fourth point of appellant refers only to the denial of the motion for new trial. The appellant raises no argument on this point except the matters covered by the foregoing decision.

There is no prejudicial error shown by the record.

The judgment and the order are therefore affirmed.

We concur: DORAN, J.; WHITE, J.

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25 Cal.App.2d 393

PEOPLE v. RODRIGUES.

Cr. 2008.

District Court of Appeal, First District,
Division 2, California.

March 17, 1938.

Hearing Denied by Supreme Court
April 14, 1938.

1. Poisons 🔑9

Where two or more persons are jointly charged with the illegal possession of narcotics, exclusive possession need not be shown. State Narcotic Act, St.1929, p. 380 as amended.

2. Poisons ⇨9

Evidence that defendant threw a quantity of narcotics out of window as officers entered room in which defendant and two others with whom defendant was jointly charged were apprehended sustained conviction for the illegal possession of narcotics. State Narcotic Act, St.1929, p. 380, as amended.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Henry Rodrigues was convicted of violating the State Narcotic Act, and he appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant, with two others, was jointly charged in an information with a violation of the State Narcotic Act, St. 1929, p. 380, as amended, having "in their possession a preparation of cocaine." All waived trials by jury and went to trial to the court. One was acquitted, another changed his plea to guilty, and this appellant was found guilty after trial. His motion for a new trial was denied.

His sole point on appeal is that the evidence is insufficient to support the judgment. There is no conflict. The three defendants were apprehended in a room rented by the one who pleaded guilty. As the officers entered, the appellant approached the window and threw some of the narcotics outside. They were found in the lightwell and were shown to have been in the same type of container as others found in the room.

[1, 2] The appellant's argument is that he could not have had exclusive possession because his codefendant rented the room and must be deemed in possession of everything found there. But exclusive possession need not be shown where two or more parties are jointly charged. Here the facts fully justify the inference that appellant was in possession of so much of the drug as he threw out of the window, and that is sufficient to sustain the judgment. The judgment is fully supported by People v. Sinclair, 129 Cal.App. 320, 19 P.2d 23.

The judgment and the order denying a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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25 Cal.App.2d 418

PEOPLE v. MATTMUELLER.

Cr. 431.

District Court of Appeal, Fourth District, California.

March 19, 1938.

1. Criminal law ⇨1156(1)

The discretion of the trial court in a criminal proceeding in granting a motion for new trial will be disturbed only when there is a clear showing of a manifest abuse of discretion.

2. Criminal law ⇨935(1)

An accused is entitled to two decisions on evidence, one by jury and one on motion for new trial by trial judge, who is not bound by conflicts in evidence but who must consider weight and credibility thereof.

3. Criminal law ⇨935(1)

In criminal prosecution, on motion for new trial, judge is under duty again to review the cause before deciding the motion, and to grant the motion if the review produces conviction of evidentiary nonsupport of verdict.

4. Criminal law ⇨1156(2)

In burglary prosecution, where state's evidence was entirely circumstantial, and many of circumstances were explained by accused's evidence, reviewing court could not declare that trial judge abused his very broad discretion in granting accused's motion for new trial, even though cold record appeared to reveal ample evidence to sustain conviction.

5. Criminal law ⇨935(1)

On motion for new trial, trial judge could disbelieve state's evidence or conclude that accused's explanatory evidence raised reasonable doubt as to accused's guilt, since such matters were confided to judge's discretion in granting new trial.

6. Criminal law ⚿1134(6)

In criminal prosecution, where court's order granting accused a new trial did not specify insufficiency of evidence as ground therefor, District Court of Appeal was not precluded from sustaining the order on that ground.

7. Criminal law ⚿1144(18)

In absence of specification of grounds on which new trial was ordered, and where the motion for new trial included evidentiary nonsupport as a ground of the motion, it is presumed that such ground was at least one of the reasons for granting the motion.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Waldemar Mattmueller was convicted of burglary, and, from an order granting a new trial, the People of the State of California appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Thomas Whelan, Dist. Atty., and Victor C. Winnek, Deputy Dist. Atty., both of San Diego, for the People.

Theodore G. Krumm, of San Bernardino, and E. L. Johnson, of San Diego, for respondent.

JENNINGS, Justice.

The defendant who had been convicted of the crime of burglary moved for a new trial. In support of the motion he urged all of the grounds which are designated in section 1181 of the Penal Code, as amended by St. 1933, p. 1341. The motion prevailed. The trial court's order granting the motion was general in its terms and did not specify any particular ground on which its action was based. From this order the People appeal.

It is here contended that the record shows that the principal grounds urged in support of the motion were, first, improper reception of certain evidence produced by appellant; and, second, prejudicial misconduct of the prosecutor which occurred during his final address to the jury. It is maintained that neither of these alleged errors would have been sufficient to require reversal of a judgment of conviction had such judgment been pronounced, hence it is argued that the trial court's action in granting a new trial is not sustainable on either of such grounds. It is further contended that the order may not be affirmed if it be assumed that the motion was granted on the ground of insufficiency of the evidence to support the verdict because it is declared that the evidence produced during the trial was ample to warrant the verdict which was returned. In this connection appellant has expended no little effort in presenting a synopsis of the evidence for the purpose of demonstrating its sufficiency.

[1-3] With respect to appellant's last-mentioned contention, it is proper to observe that a trial court in a criminal proceeding is vested with so wide a discretion in the matter of passing upon a motion for a new trial that its action in granting the motion will be disturbed only when there is a clear showing of a manifest and unmistakable abuse of such discretion. People v. Knutte, 111 Cal. 453, 44 P. 166; People v. Canfield, 173 Cal. 309, 159 P. 1046; People v. Ferlin, 203 Cal. 587, 596, 265 P. 230; People v. Rosenberg, 135 Cal.App. 766, 26 P. 2d 922. It has frequently been observed that a defendant in any action which is tried before a jury is entitled to two decisions on the evidence, one by the jury and the other by the trial judge in ruling upon a motion for a new trial, Smith v. Royer, 181 Cal. 165, 183 P. 660; People v. Bacos, 14 Cal.App.2d 338, 349, 58 P.2d 221, that the court in the latter instance in passing upon the sufficiency of the evidence is not bound by conflicts in it, Moyer v. Dresch, 2 Cal. App.2d 655, 38 P.2d 849, and that, where the evidence is conflicting, such features as credibility and the manner and appearance of witnesses in testifying, and the proper weight to be accorded to evidence must be given consideration, People v. Bacos, supra. The responsibility resting upon a trial judge when a motion for a new trial is presented again to review a cause and only after such review to decide the motion and the duty imposed upon the court to grant the motion if such review produces a conviction of evidentiary nonsupport of the jury's verdict are matters which have also been emphasized. Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774; People v. Cesena, 18 Cal.App.2d 727, 64 P. 2d 732.

[4, 5] Examination of the record on appeal which is here presented shows that the evidence submitted by appellant was entirely circumstantial and that many of the circumstances upon which the prosecution relied to prove respondent's guilt of the offenses charged in the information were

explained by him and by other witnesses who testified in his behalf. Under these circumstances it is obvious that a reviewing court may not properly declare that the trial judge abused the very broad discretion accorded him by granting respondent's application for a rehearing of the cause. Even though the reader of the cold record might conclude that the evidence was ample to sustain the conviction, reversal of the order granting a retrial is not warranted. The judge who presided at the trial of the cause and who had the opportunity of observing the demeanor and manner of witnesses as they testified and of discovering the motives that may have animated them in giving their testimony and the interest, if any, which they had in the outcome of the case, occupied a superior position to that which a reviewing tribunal occupies in deciding whether or not a retrial is justified. For all that appears the trial judge may have disbelieved the testimony offered by appellant's witnesses or he may have concluded that the explanation given by respondent and his witnesses raised a reasonable doubt of respondent's guilt. These were matters which were confided to his discretion, and it may not be declared from the record here presented that he abused such discretion.

[6, 7] Although no point is made of it, the fact that the court's order did not specify evidentiary insufficiency as a ground for approving respondent's application for a new trial does not foreclose this court from sustaining the order on that ground. As this is a criminal appeal, in the absence of a specification of the grounds on which the order is based and where, as here appears, the motion for a new trial included evidentiary nonsupport as one of the grounds of the motion, it will be presumed that this was at least one of the reasons for granting the motion. People v. Flood, 102 Cal. 330, 36 P. 663; People v. Dewar, 49 Cal.App. 263, 193 P. 156; People v. Ray, 91 Cal.App. 781, 267 P. 593; People v. Rosenberg, 135 Cal.App. 766, 26 P.2d 922.

The determination that the order granting a retrial of the cause is sustainable on the ground that the trial court concluded that the verdict was not supported by the evidence renders it unnecessary to consider whether or not certain evidence was improperly received during the trial or the propriety of respondent's complaint urged in support of his motion that the prosecutor was guilty of prejudicial misconduct.

For the reasons stated, the order of the trial court granting respondent's motion for a new trial is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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25 Cal.App.2d 402

PEOPLE v. SHELLENBERGER.

Cr. 3046.

District Court of Appeal, Second District,
Division 1, California.

March 17, 1938.

As Amended April 20, 1938.

1. Intoxicating liquors 🔑238(1)

In prosecution for possession of still capable of being used in production of liquor, adaptability for setting up a still of materials found in defendant's possession was for jury notwithstanding defendant's testimony that they were not intended for a still. St. 1937, p. 2130, § 3.

2. Criminal law 🔑742(1), 743

In criminal prosecution, whether exculpating stories of defendant and his witnesses should be believed is for jury.

3. Intoxicating liquors 🔑236(19)

Evidence *held* to authorize conviction for possessing still capable of being used in production of alcoholic beverages. St.1937, p. 2130, § 3.

4. Criminal law 🔑781(7)

In criminal prosecution, accusatory statements made by officers in presence of two defendants were hearsay as respects convicted defendant, except in so far as convicted defendant made express admission in reply thereto, and did not authorize instruction that silence may be taken as evidence indicating an admission of guilt.

5. Criminal law 🔑736(2)

Whether circumstances under which accusatory statements were made were such as to make defendant's failure to reply proper evidence in criminal prosecution is, in the first instance, a question for trial court.

6. Criminal law 🔑409

In order for defendant's failure to reply to accusatory statements to be proper evidence in criminal prosecution, there should be a prima facie showing that some action or reply by defendant would naturally be called for and that defendant had opportunity to reply, and statement is not admissible notwithstanding hearsay rule merely because made in defendant's presence.

7. Criminal law ⟹1186(4)

A conviction would not be reversed because of giving of erroneous instruction, where evidence of guilt was so substantial that verdict could not have been otherwise if instruction had not been given. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Leslie E. Shellenberger was convicted of ownership of a still, and he appeals.

Affirmed.

Selma K. Ellner, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WHITE, Justice.

The defendant was convicted of a violation of section 3 of the Alcoholic Beverage Control Act, Stats.1937, c. 758, p. 2130, which denounces as a felony the ownership or possession of a still used in the production, or capable of being used in the production, of alcoholic beverages, without first having obtained a still license from the state board of equalization. From the judgment and sentence, this appeal is prosecuted.

As the first ground for reversal, it is urged that the evidence is insufficient to support the verdict, in that the prosecution failed to meet the burden resting upon it to prove that the paraphernalia found upon the premises of appellant was "capable of being used as a still" within the meaning and contemplation of the statute.

There was presented to the jury evidence showing that on the afternoon of July 30, 1937, three officers of the liquor control board found on the premises at the residence of the defendant certain paraphernalia which these officers testified was capable of being used as a still. It was conceded that defendant did not have a license to own or operate a still, as required by the Alcoholic Beverage Control Act; and it was also conceded that defendant owned the paraphernalia referred to as a still. There was some evidence, also, that a little whisky was running from a drainpipe in the kitchen sink to a sump hole in the back yard, which was the only circumstance indicating that the defendant had ever used the paraphernalia as a still. We think it may justly be said that the evidence falls far short of indicating that the defendant ever used the paraphernalia in question as a still; and therefore his conviction can be sustained only by proof that the property in question was "capable of being used as a still" within the meaning of the statute. In this connection, one of the officers testified as follows:

"Q. Then you went to the property with a search warrant? A. I did.

"Q. What time did you get back? A. Approximately an hour later.

"Q. Tell us what happened when you got back. A. When I got back there I immediately went to the rear of the house and in front of this small shed which is back there was all this, these exhibits.

"Q. By these exhibits you mean what articles? A. Well, everything with the exception of the bottles.

"Q. First, let's pick out the ones you actually saw there in that location. A. I saw this large pot, this pot, this barrel and four others.

"Q. Just like it? A. Different sizes, one smaller, one the same, and two larger. I saw this can and another just like it, both containing the same thing, oak chips, and there were five five-gallon cans which we destroyed on the premises which were also by the shed. * * *

"Q. I will ask you whether or not oak chips are used in the manufacture of whisky? A. They are.

"Q. For what purpose? A. For giving the color to clear spirits. In other words, clear spirits are a product from a still, and, of course, chips are more or less used as a dye to give the spirits the usual color of whisky.

"Q. All right, now, calling your attention to the coils that appear here, did you see those coils there that day? A. I did.

"Q. Where did you see them? A. I first saw them when Officer Hennessy was pulling them out from this pile of scrap wood which was behind the house.

"Q. That was the pile near the shed you spoke of? A. Well, it was about 30 feet away from the shed. * * *

"Q. Now, then, did you go inside of the house? A. I did.

"Q. And did you find anything in there? A. Yes.

"Q. What did you find? A. I found the 27, I believe there are, empty whisky bottles, pint and half-pint sizes, and also the alcohol hydrometer which is on the top of the kettle there.

"Q. That is this object here? A. That is part of it. It is evidently broken, but the other half is there. * * *

"Q. You speak now of the coil marked People's Exhibit 3 for identification? A. Yes. The coil would be inserted in the dome of this kettle part, and this needs to be sealed, you can wrap a piece of friction tape around it and I have seen flour and water used, dough to seal it. * * *

"A. This apparatus is bent and set over a fire, or set up over a stove, the fire then applied and this coil can be bent, any part of it, put through a small pan of water which is the usual custom, or a bucket or a tub, the heat then vaporizes the alcohol which is in the mash and the alcohol will vaporize at a much lower temperature than the water, therefore it vaporizes first and comes up through the dome and through the coil as vapor, and as it gets further on in the coil it is cooled so that it condenses, particularly when it goes through that part of the coil which would be submerged in the water, it condenses and then becomes a very concentrated form of alcoholic spirits."

Further in the testimony of this same officer we find the following:

"Q. I take it, officer, you are an expert, that is, you have a thorough knowledge of the operation of stills? A. I have.

"Q. Assuming I took that pot and attached the copper tube or any kind of tube, and run it into a bucket of water and put mash in it, put it over the stove, lighted the burner, could you make alcoholic spirits? A. Absolutely you could."

[1-3] While it is true that appellant himself testified that the material and paraphernalia received as exhibits were junk, and that he did not use or intend to use the same for the manufacture of alcoholic beverages, and also produced testimony to the effect that even when these parts were assembled together, they did not constitute a still, the ultimate question as to the character of the materials and their adaptability for setting up a still was one of fact for the jury to determine. In People v. Kiser, 24 Cal.App. 540, 141 P. 1078, it was held that the direct testimony of the accused may be so contradicted even by circumstantial evidence alone that the jury need not believe it. Also, it is a well-established principle of law in this state that although the defendant's own story and that of witnesses presented in his behalf exculpate him, it is for the jury to say whether his story and those of his witnesses should be believed. People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Sears, 119 Cal. 267, 51 P. 325; People v. Billings, 34 Cal.App. 549, 168 P. 396; People v. Stephens, 29 Cal.App. 616, 157 P. 570, 572. In the instant case, the jury's verdict indicates that they did not believe the appellant's story, nor were they favorably impressed by the testimony of his witnesses to the effect that the articles in question did not measure up to the standard of being the component parts of a still; but, on the contrary, found as a fact, upon substantial evidence produced by the prosecution, that the materials and paraphernalia in question were "capable of being used as a still." While a mere reading of the record in this case might leave one in some doubt on the question of defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the jury and trial judge, who saw and heard the various witnesses, and who were in a much better position to determine the truth than a court that does not possess such an advantage. Appellant's contention that the still found on the premises was not completely set up is met by the evidence that the still was complete and, had the parts been assembled, could have been used for the unlawful purpose of manufacturing alcoholic beverages. When there is added to the foregoing the testimony with reference to the possession of a quantity of empty whisky bottles, some five-gallon cans, and some "oak chips" which, it was testified, are used for giving the color of whisky to clear spirits when they emerge from the still, there seems to be little room for doubt but what the jury was justified in its verdict. The inference and conclusion at which the jury arrived is also considerably strengthened by the testimony of one of the officers, as follows: "And Shellenberger made the statement, this is the first time in his life he had ever done

anything like this and he should have known he couldn't get away with it."

Appellant finally contends that reversible error was committed by the trial court in the giving of an instruction as follows: "You are instructed that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge, and unless you are convinced beyond a reasonable doubt that the defendant did stand mute when the accusatory statements were made such statements should be entirely disregarded by you."

[4-7] This instruction should not have been given, because nowhere in the transcript do we find evidence of any occasion when appellant remained silent in the face of an accusation which would naturally call for a reply. While it is true that the question as to whether the circumstances are such as to make the failure to reply proper evidence tending to show an admission is, in the first instance, a question for the trial court, there should be testimony constituting a prima facie showing that the statement was one that might under all the circumstances shown be held to naturally call for some action or reply on his part, and that the occasion and circumstances were such as to afford him an opportunity for reply. In the instant case, we find certain accusatory statements made by the officers in the presence of appellant and his codefendant, the latter of whom was acquitted, but these statements were directed to both defendants, and the transcript indicates that the defendant Hardy made reply and also that appellant made the incriminatory statement heretofore ascribed to him. Where, as in the instant case, the accusatory statement was addressed to two defendants, and one of them makes a reply, it does not present a situation under which an occasion exists which would naturally call for a reply from the other defendant. If the accusatory statement were addressed to a particular defendant, or if it were addressed jointly to two or more defendants, and none of them replied, then the failure of any of them to reply might result in a situation where, if a reply was naturally called for by the accusatory statement, the silence of all of them could be shown in evidence. But such is not the case here. Therefore this conversation, other than the admission on the part of appellant, was purely hearsay as to him. It is well settled that simply because a statement is made in the presence of the defendant, it is not per se admissible against him, and the hearsay rule applicable to such statements remains in full force and effect, except under conditions and circumstances which were not here present. People v. Smith, Cal.App., *77 P.2d 277.* However, the evidence against appellant is so substantial that we cannot say that the verdict might have been otherwise had the erroneous instruction not been given. Therefore, impressed as we are that there was no miscarriage of justice in the conviction of appellant, the constitutional provision (section 4½, art. 6) prohibits us from disturbing the jury's verdict.

The purported appeal from the sentence is dismissed.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

25 Cal.App.2d 372

CASTRO v. SUTTER CREEK UNION HIGH SCHOOL DIST. et al.

Civ. 5962.

District Court of Appeal, Third District, California.

March 16, 1938.

Rehearing Denied April 15, 1938.

Hearing Denied by Supreme Court May 12, 1938.

1. Schools and school districts 🔑122

In action for injuries received when plaintiff fell into unlighted and unguarded hole in parkway on property of school district while walking from school auditorium to automobile parked at curb, whether other sufficiently illuminated parking places were available on night in question, and whether plaintiff was guilty of contributory negligence in allowing automobile to be parked where it was and in proceeding across parkway instead of walking around driveway, was for jury.

2. Schools and school districts ⚷89

In action against school district for injuries received when mother fell into unlighted and unguarded hole in parkway on property of school district while walking to parked automobile from auditorium to which she had gone to chaperon daughters at school dance, question whether mother was licensee or invitee at time of accident would not affect question of liability of school district under statute. St.1923, p. 675, § 2.

3. Counties ⚷146
Municipal corporations ⚷745
Schools and school districts ⚷89

Under statute relating to liability of counties, municipalities, and school districts for injuries resulting from dangerous or defective condition of public streets, highways, buildings, grounds, works, and property, liability is predicated on act which leaves place or condition dangerous or defective and liable to cause injury to general public on premises belonging to public and with which public officers are charged with duty of taking precautions which may be reasonably necessary to protect public. St.1923, p. 675, § 2.

4. Schools and school districts ⚷89

Four unguarded holes of width of 3½ feet at top, which were dug in center of parkway on school property, which was of such width that holes could not have been more than from 1½ to 2½ feet from sidewalk or curbing if dug in center of parkway, were "pitfalls" and "traps" rendering school district liable for injury to person who fell into one of such holes on way from school auditorium to automobile parked at curb. St.1923, p. 675, § 2.

[Ed. Note.—For other definitions of "Pitfall" and "Trap," see Words & Phrases.]

5. Negligence ⚷59

A proprietor is liable if he makes an excavation on his land so close to a highway on which others have a right to travel that person using highway falls therein and is injured while exercising ordinary care, if excavation is at such a proximity to highway that it might reasonably be expected that injury might accrue.

6. Evidence ⚷14

It is common knowledge that space between sidewalk and curbing known as "lawn plot" or "parkway" is frequently crossed over by automobile drivers or automobile passengers to reach automobile parked in driveway along curbing adjoining such parkway or lawn plot.

[Ed. Note.—For other definitions of "Parkway," see Words & Phrases.]

7. Negligence ⚷136(9)

Contributory negligence is established as matter of law only where no fact is left in doubt and no deduction or inference other than negligence can be drawn by jury from evidence, and question is one of fact for jury even where facts are undisputed if reasonable minds might draw different conclusions.

8. Negligence ⚷38, 136(26)

The owners of a parkway must exercise due care to have parkway kept in reasonably safe condition, and member of general public is not guilty of contributory negligence as matter of law in passing over parkway. St.1923, p. 675, § 2.

9. Appeal and error ⚷1176(5)

On reversal of judgment for defendant which was entered after verdict for plaintiff had been set aside by court, trial court was directed to vacate order setting aside verdict, restore and render verdict, and enter judgment in conformity therewith which would be deemed to have been returned and entered as on date in which order was complied with.

◆

Appeal from Superior Court, Amador County; Anthony Caminetti, Judge.

Action by Theodora Castro against Sutter Creek Union High School District and others for injuries received when plaintiff fell into unguarded hole in strip of land owned by defendant. A verdict for the plaintiff was set aside and, from a judgment in favor of the defendant, the plaintiff appeals.

Reversed, with directions.

Robert McMahon, of San Francisco, and T. G. Negrich, of Jackson, for appellant.

Allen L. Martin, of Jackson, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the verdict of the jury was rendered in favor of the plaintiff in the sum of $2,573.88, against the defendant district and against the remainder of the defendants as trustees of said school district. At the conclusion of the plaintiff's case the defendants made a motion for a directed verdict. The motion was denied. Thereafter, and upon the rendition of the verdict, the defendants made a motion that judgment be entered in their favor notwithstanding the verdict. This motion was granted, and from the judgment entered thereupon the plaintiff prosecutes this appeal.

The plaintiff's action is based upon injuries received by her on or about the night of March 20, 1936, by falling into an unguarded hole in a strip of land lying between a sidewalk and the curbing adjoining a street. This strip of land was something over 100 feet in length and approximately 6 feet in width at one end and some 9 feet in width at the opposite end. The strip of land was intended as a lawn plot and place for planting trees. In the testimony it was referred to as a "lawn plot," but, in the cases which we shall hereafter cite, is known as and called a "parkway." This strip of land was a part of the premises belonging to the defendant school district. Four holes had been dug in this strip of land approximately 3½ feet in width at the top, 2 feet in width at the bottom, and some 2 feet in depth. The holes were approximately 20 feet apart, and had been dug a number of weeks before the occurrences hereinafter mentioned, and on the night plaintiff was injured were wholly unguarded. The injury occurred to plaintiff by falling into a hole designated as "Hole Number 3" in the testimony. We may here state that Lillian Bowls, a member of the high school faculty, fell into "Hole Number 4" shortly after the accident to the plaintiff.

The record shows that on the night in question the plaintiff went to a dance held at the auditorium belonging to the school district. Her purpose in going to the dance was to chaperon her two daughters. The home of the plaintiff was at a town called "Plymouth." The plaintiff, in company with her two daughters, left the town of Plymouth and drove to the auditorium maintained by the trustees of the Sutter Creek Union High School District, one of the daughters driving the automobile for the party. The dance at the auditorium appears to have been held in honor of the success of the high school football squad. The auditorium where the dance was held is a building about 110 feet in depth, extending in an easterly and westerly direction, with the main entrance at the east end thereof. In front of the auditorium is a vehicle driveway. This driveway extended around to, and along, the south side thereof. Along the full length of the auditorium on the south side was first, an earthen strip 3 feet in width; next to that was a cement walk 6 feet in width; next to the walk was the strip of earth to which we have referred, prepared for lawn sowing. This plot was separated from the driveway by a concrete curb for the full length thereof. It appears that there was a parking area on both the north and south sides of the auditorium. On arrival at the auditorium the appellant's daughter, who was driving the automobile, made a circle on the north side in an effort to locate a parking space, and, finding none, drove around the front of the auditorium and parked on the south side where other cars were parked along the curb. As the driver of the car was moving along the south side of the auditorium, a parked car backed out and appellant's car was driven into the space thus vacated between two other parked cars. On other and previous occasions the driver of the appellant's car was a passenger in cars that had parked on the south side of the auditorium, against the curb, and the school bus also parked there.

It also appears that on nights when the school team played basketball in the auditorium the bus would bring students to these activities, and would park on the south side of the auditorium. There was testimony to the effect that at the different activities held at the auditorium there were always cars parked on the south side, and that it frequently happened that there were more cars parked on the south side of the auditorium than on the north side. There does not seem to be any illumination on the south side of the auditorium, save and except such as came from a top-story window, from which a ray of light was projected on the ground not far from "Hole Number 3." There appears to have been some light on the driveway which was used by the appellant in going to the auditorium after leaving the car in which she had arrived, but at the time in question the driveway was being used by cars leaving the auditorium.

It appears that the appellant with her two daughters left the auditorium, walked a short distance on the sidewalk which we have mentioned, to a point somewhere in the neighborhood of where their car was parked. There they left the sidewalk and started to cross the lawn plot or parkway which we have mentioned. One of the daughters preceding the plaintiff in starting across this plot found herself gently sliding into "Hole Number 1," and warned her mother to look out for same. The appellant thereupon said she would go where there was light, returned to the sidewalk, and proceeded thereon to the rear of the auditorium, a distance of about 60 feet, and then again walked onto the lawn plot about opposite her parked car, and in so doing fell into "Hole Number 3" near the ray of light, as aforesaid, but which hole itself was unlighted, and, as we have said, wholly unguarded.

In falling into the hole the plaintiff sustained severe injuries, but as the seriousness of the plaintiff's injuries are unquestioned, and whether the damages awarded by the verdict were or were not excessive, is not presented to us for consideration, the extent of the injuries to the plaintiff and the amount of the damages awarded by the verdict require no further mention.

[1] On the part of the defendants, testimony was introduced to the effect that there were other parking places available for the plaintiff on the night in question, and that these parking places were sufficiently illuminated. That, however, was a question for the jury. The testimony shows that there were a number of cars parked in the neighborhood of where the plaintiff's car was parked, and that that portion of the driveway adjoining the auditorium was frequently used for parking purposes.

We have mentioned the fact that a member of the high school faculty had a car parked in the same neighborhood, and fell into "Hole Number 4." This member of the faculty was accompanied by two other persons going to parked cars. Whether these other persons were accompanying Lillian Bowls to her car, or cars belonging to themselves, does not appear. It does sufficiently appear, however, as we have stated, that the place where the appellant's car was parked was being used by the general public when attending functions at the high school auditorium.

[2] The record likewise shows that the parents or mothers of high school girls attending dances at the auditorium were welcome to attend the dances and act as chaperons for their daughters. There is some question as to whether the mothers or parents were expressly invited, or came only because of an understanding that they were welcome. This, however, we think does not affect any legal conclusions to be drawn from any of the facts attendant upon the injury to the plaintiff.

On the part of the defendants it is further contended that the plaintiff was guilty of contributory negligence in allowing her car to be parked where it was, and also in proceeding across the parkway or lawn plot in order to reach her car, instead of walking down the driveway. That, however, was a question for the jury. It was a case of either walking across the parkway from the sidewalk where there were no cars, or walking down the driveway approaching cars that were leaving the auditorium, and as to whether the appellant was negligent in choosing the course pursued by her, rather than going down the driveway, meeting approaching cars, was certainly a question for the jury, and not at all a question of law for the court.

The record shows that the four holes in question had been dug some weeks previous to the accident, had at all times been left unguarded, and that the officers of the district had personal knowledge of the fact that the holes had been dug, the purposes for which they had been dug, and the fact of the holes being left unguarded.

Upon this appeal both the plaintiff and the defendants have addressed their arguments to the question as to whether the appellant was a licensee or an invitee, and also as to whether the appellant was guilty of contributory negligence as a matter of law.

While the arguments presented regarding the status of the plaintiff as to whether she was a licensee or an invitee at the time of the accident are interesting and learnedly presented, in view of what we are about to add we think it wholly immaterial. Whether licensee or invitee is not at all determinative of the liability of the defendants.

[3] This action comes squarely within the provisions of section 2 of the Public Liability Act, approved June 13, 1923, Stats. 1923, p. 675, Deering's Gen.Laws of California, 1923, p. 2310. That section reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any

such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

It will be observed that the provisions of the section just quoted bases liability upon any act which leaves a place or condition dangerous or defective and liable to cause some injury to the general public. The act is directed not for the safety, particularly either of licensees or invitees, but to the general public having occasion to use the premises belonging to the public, and with which public officers are charged with the duty of taking such precautions as may be reasonably necessary to protect the public from such dangerous or defective conditions.

[4-6] We think it beyond question that the four unguarded holes which we have described fall within the classification of pitfalls or traps. It is within the common knowledge of everyone that the space between a sidewalk and a curbing known as the lawn plot or parkway is frequently crossed over by automobile drivers or automobile passengers to reach cars parked in a driveway along the curbing adjoining such parkway or lawn plot.

The school district in question occupied somewhat the same position as an individual proprietor would occupy with relation to excavations created and maintained so close to sidewalk or highway as to render the same dangerous to the general public. In 19 California Jurisprudence, page 610, paragraph 45, we find the following: "A proprietor is liable if he makes an excavation upon his land so close to a highway upon which others have a right to travel that one using the highway, while exercising ordinary care, falls therein and is injured * * * In order to bring a case within the foregoing rules it is essential that the excavation or obstruction be at such a proximity to the highway that it might reasonably be expected that injury may occur."

The parkway in question varied approximately from—feet in width. The holes at the top were 3½ feet wide, which, at the place where the first hole was dug, if it were dug in the center of the parkway, would leave only approximately 1½ feet from the sidewalk. Just how the lines of the parkway diverge, so as to give a width of 9 feet at the extreme end of the same beyond the fourth hole, is not disclosed by the record, but it could not in any place, if the holes were dug in the center of the parkway, have left more than approximately 2½ feet from the sidewalk or the same distance from the curbing. That such excavations, under such circumstances, were both pitfalls and traps requires no argument; just as statement of the facts appears to us conclusive.

A case involving somewhat the same principles in the instant case is that of Boothby v. Town of Yreka City, 117 Cal. App. 643, 4 P.2d 589. In that case the city had leased the upper story of a firehouse to the county of Siskiyou for the purposes of using the same as a polling place. It appears that the stairway was in a defective condition, of which condition the city had knowledge. The plaintiff was injured by reason of the defective condition of the stairway, and brought an action against the city. In the case referred to the court set out in full section 2 of the Public Liability Act, St.1923, p. 675, requiring cities and others to take such action as was reasonably necessary to protect the public against dangerous or defective conditions. The city, as owner of the premises, was held chargeable with notice that the premises were to be used for public purposes. It does appear that the plaintiff appeared for the purpose of voting in pursuance of a notice given by the officers of the precinct in which the building was located, and as to the county or precinct might be considered an invitee, but as against the city the plaintiff was simply one of the general public having a legal right to visit the premises. For the time being the premises were being used as public property for the convenience of the voting public within the precinct where the building was located. The court in the case referred to cited a number of cases to the effect that, where property is leased for a public use, the care required should be of a higher degree than when the property is leased for private purposes.

[7] Applying the principles to the instant case, which governed the case in holding the town of Yreka City liable, the conclusion would be inescapable that the defendants here are likewise liable. Before further citing cases as to the

liability of the defendants we may call attention to the case of Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, 515, as to the power of the court concerning the question of contributory negligence. It is there said: "'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 P. 1006; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651."

To the same effect is the case of Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 204 P. 576. In this case a large number of cases are cited supporting the rule that where there is any conflict in the evidence the question is for the jury and not for the court as a question of law.

In Knight v. La Grande, 127 Or. 76, 271 P. 41, 61 A.L.R. 256, the action was based upon an injury sustained while crossing the parkway lying between a sidewalk and the curbing adjoining a street. The parkway was just a narrow strip left for the purpose of installing telephone poles, fire hydrants, trees, and the planting of grass. It was there held that a city is required to take notice of the fact that pedestrians have occasion to walk over the parkway strip along a street, and, although the pedestrian must expect to find such objects as fire hydrants and telephone poles, and must be content with a grassy surface instead of a smooth walk, the city must, nevertheless, exercise due care to have such area in a reasonably safe condition. It was further held in that case that an occupant of an automobile was not guilty of negligence in passing over such parkway to the sidewalk where the car was parked along the adjoining curbing. It was further held that the occupant of an automobile so alighting was entitled to presume that the parkway was in a reasonably safe condition. It was likewise held that what was a reasonably safe condition was a question for the jury. It appears that the plaintiff was injured by falling into a trench. The trench was left unguarded.

In the case of Butler v. McMinnville, as reported in 126 Or. 56, 268 P. 760, 59 A.L.R. 381, we find an extended note supporting every proposition which we have herein stated, especially supporting the proposition that the question of contributory negligence under the circumstances was a question for the jury. In the Butler Case, supra, it was held that the law does not require that a city shall maintain a parked strip in the same condition for travel as it would a paved street or sidewalk, since there are certain obstructions incident to its use, such as electric light poles and signboards, which may rightfully be placed in a portion of the street set aside and devoted to purposes of ornamentation. However a city has no right to maintain anything in the nature of a pitfall, trap, snare or other like obstruction whereby the traveler, in yielding to the impulse of the average person to cut across a corner in a hurry, may be injured, nor will it be permitted to allow others to do so.

[8] The notes to the Butler Case are so extensive that it would unduly lengthen this opinion to make many quotations therefrom, but all the cases cited are to the effect that cities must exercise due care to have such parkways or the lawn plots kept in a reasonably safe condition, and that a member of the general public is not guilty of contributory negligence, as a matter of law, in passing over such parkway. We may safely conclude this opinion with the statement that the annotations found appended to the Butler Case, supra, are conclusive against the defendants upon every question presented for our consideration upon this appeal.

[9] Following the procedure outlined in the case of Southern Pacific Land Co. v. Dickerson, supra, it is ordered that the judgment is reversed, with directions to the trial court to vacate the order setting aside the verdict, to restore and render the verdict, and to enter judgment in conformity with the verdict, and, as thus restored, the verdict and judgment shall be deemed to have been returned and entered as on the date in which this order is complied with.

We concur: **PULLEN, P. J.; THOMPSON, J.**

25 Cal.App.2d 445

HOLMAN v. HOLMAN et al.

Civ. 2117.

District Court of Appeal, Fourth District, California.

March 22, 1938.

As Modified on Denial of Rehearing April 21, 1938.

1. Judgment 🔑713(2)

The rule of "res judicata" is designed to prevent vexatious litigation and to require litigants to rest upon one decision, and includes not only matters actually determined by judgment, but every other matter which parties might have litigated as incident thereto or essentially connected with the subject-matter, in respect to matters of either claim or defense.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

2. Executors and administrators 🔑315(6)

A decree of distribution in probate proceedings giving testator's widow her half of community property and life estate in and power to sell the other half, and adjudging other half to devisee of remainder upon widow's death, constituted a final adjudication of terms of will.

3. Judgment 🔑729

In action to set aside trust created by life tenant who had power of disposal, decree upholding validity of trust on ground that life tenant was competent at time of making trust and had not agreed to transfer property to remainderman, which expressly refused to make findings concerning nature of remainderman's interest on ground that terms of will creating remainder had been adjudicated by probate decree of distribution, was not res judicata against existence of remainderman's rights.

4. Life estates 🔑23

Generally, where entire estate is sold, there must be an apportionment of proceeds between life tenant and remainderman, based upon value and nature of their respective interests at time of sale.

5. Estates 🔑10(3)

Life estates 🔑23

Where life tenant and remainderman jointly sold property and executed grant deed to purchaser, the respective estates terminated, grantee became owner of fee title, and life tenant and remainderman could divide proceeds, agree for future division, or leave life tenant in possession of proceeds.

6. Remainders 🔑17(3)

Where mother, who owned half interest in property and life estate with power to sell in other half interest, and son who owned remainder in other half interest, voluntarily joined in deed thereof to third party, and mother took proceeds of sale with son's consent and subsequently transferred such proceeds to a trustee by irrevocable trust agreement, son's cause of action against trustee to recover such proceeds did not arise until mother's death, with respect to running of statute of limitations, as against contention that mother took proceeds in trust and repudiated trust when she transferred proceeds to trustee. Civ.Code, § 1108.

7. Life estates 🔑23

Tenancy in common 🔑35

Where mother owning undivided half interest in property and life estate with power to sell in other half joined with son owning remainder in other half, in deed to third party, and took control of the proceeds with son's consent, her transfer of proceeds to a third party as trustee was effective only as to her half interest and life estate in other half. Civ.Code, § 1108.

8. Life estates 🔑23

Where mother owning half interest in property and life estate in other half joined with son owning remainder in other half in sale to third party, and mother transferred proceeds to trustee, son was entitled on mother's death to half of proceeds, less amount paid by mother in satisfaction of mortgage on the property given to secure son's personal obligation. Civ.Code, § 1108.

9. Appeal and error 🔑1151(2)

Where appellee conceded that he was not entitled to interest against defendant trustee individually, reviewing court would vacate portion of judgment that awarded interest, and affirm.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Suit for declaratory judgment and other relief by Gus Wescott Holman, also known as Guy W. Holman, against Ethel M. Holman and others. From a judgment

for plaintiff, defendant Bank of America National Trust & Savings Association appeals.

Modified and, as modified, affirmed.

Rutan, Mize & Kroese, of Santa Ana, Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

William P. Doyle and Albert E. Coger, both of Los Angeles, for respondent.

JENNINGS, Justice.

Plaintiff sued for a declaratory judgment and "for such other and further relief as may be proper." The answer of the defendant Bank of America National Trust & Savings Association, a national banking association, set up as affirmative defenses, first, that the cause of action alleged in plaintiff's complaint had been litigated in a prior action between the same parties and the judgment rendered in said prior action constituted a complete adjudication of the issues involved in the present proceeding; second, that the cause of action alleged in plaintiff's complaint was barred by the statute of limitations; third, that the cause of action described in the complaint was barred by plaintiff's laches in bringing the present suit. Trial of the action resulted in the rendition of a judgment adverse to the above-mentioned defendant from which it has presented this appeal.

There is no dispute between the parties to this appeal as to the pertinent facts which were developed by the evidence produced during the trial. These facts are embodied in the following statement: Plaintiff's father, Sidney Holman, died in Orange county on February 26, 1921. By his will said decedent, after making two bequests of money, gave and bequeathed the entire residue of his estate to his wife, Emma Holman, "to be held and used by her in any manner she may see fit during her natural life, with power to sell any portion thereof that may be necessary for her proper maintenance and support." The will further provided that "On the death of my beloved wife, it is my will and I hereby devise and bequeath to my son, Guy W. Holman, all the rest, residue and remainder of my property, both real and personal, wheresoever situate, to be his forever." Probate of the will resulted in the entry of a decree of distribution on June 9, 1922, whereby it was adjudged that the widow, Emma Holman, was entitled to take absolutely as her own an undivided one-half of the entire residue of the estate remaining after the bequests and expenses of administration were paid and to have a life estate in the remaining one-half to be held and used by her as she might see fit during her life, with power to sell any portion thereof that might be necessary for her proper support. The decree thus rendered was based on an implied finding that the entire estate of the deceased was community property of the testator and his wife, Emma Holman. Apparently, the greater part of said estate and the only part thereof which is involved in the present action consisted of a 20-acre parcel of land located in Orange county. On April 12, 1926, Emma Holman and Guy W. Holman jointly executed a grant deed whereby they conveyed fee title to the above-mentioned 20-acre tract to R. O. Horner. The consideration for such transfer was the sum of $32,000 in cash, less the necessary expenses incidental to the sale, and a conveyance by Horner of title in fee to a parcel of land in Santa Barbara county. This last-mentioned real property will hereafter, for convenience, be referred to as "the Santa Barbara property." The deed executed by Horner to the Santa Barbara property named Emma Holman as the sole grantee. The net cash proceeds of the sale being a sum of money somewhat in excess of $31,000 were likewise paid to Emma Holman. From these proceeds Emma Holman paid the sum of $4,128.33 in full satisfaction of a mortgage against the Orange county property, which mortgage had been given to secure payment of an obligation of the plaintiff herein, Guy W. Holman. On May 10, 1926, Emma Holman created an irrevocable trust at the First National Bank of Anaheim, the predecessor of the Bank of America National Trust & Savings Association, and transferred to said First National Bank of Anaheim as trustee certain real and personal property. Included in the property thus turned over to said bank was the Santa Barbara property and the remainder of the cash proceeds received by Emma Holman from the sale of the 20-acre Orange county tract. The declaration of trust which the First National Bank, as trustee, and Emma Holman, as trustor, executed on May 10, 1926, provided that the bank, as trustee, should pay to Emma Holman during her life all the net income derived from the trust estate and was authorized and empowered to use and apply for Emma Holman's benefit such portions of the principal of the trust estate as the trustee in its discretion might determine to be adequate to provide for the trustor. The instrument further provided that upon Emma Holman's death the trustee should first pay from the funds and property remaining in the trust estate funeral and burial expenses and charges incurred during the trustor's last illness and should then deliver to Guy W. Holman, her son, or his lineal descendants, one-third of the remainder of the trust estate and should retain the remaining two-thirds of such trust estate in trust for designated beneficiaries who were the minor children of Guy W. Holman, paying to such beneficiaries annually in equal proportions the net income from the trust estate and delivering to each beneficiary his or her share of the estate when such beneficiary should attain the age of 25 years. On July 7, 1926, Emma Holman was adjudged incompetent on the petition of Guy W. Holman and L. E. Miller was appointed by the superior court of Orange county to be the guardian of her person and estate. Shortly thereafter an action No. 21000 was instituted in the superior court of Orange county by Emma Holman through her guardian whereby it was sought to have the trust created by her on May 10, 1926, annulled and set aside and the property transferred by her to the First National Bank of Anaheim pursuant to the trust agreement restored and reconveyed to her on the ground of her alleged incompetency at the time she created the trust. The defendants named in this suit were the First National Bank of Anaheim, Guy W. Holman, and two minor children of Guy W. Holman. Guy W. Holman filed an answer and a cross-complaint in this action. In his answer he admitted all of the allegations contained in the complaint of the plaintiff. In his cross-complaint he alleged that he had joined with his mother, Emma Holman, in the sale of the Orange county property and that it was agreed between his mother and himself that the proceeds derived from said sale should immediately be divided between them in the following manner: First, that the sum of approximately $4,000 should be used to pay off the mortgage on the Orange county land; second, that his mother would pay him the sum of $8,000 in cash; third, that his mother would execute a deed conveying to him the fee title to the Santa Barbara property which he alleged was of the value of $8,000. The cross-complaint further alleged that his mother did not carry out her part of the agreement but, on the contrary, transferred and conveyed to the First National Bank of Anaheim the entire remainder of the proceeds obtained from the sale, also fee title to the Santa Barbara property, which transfer was made without Emma Holman receiving any consideration therefor and was procured by said bank through undue influence exerted by the bank upon Emma Holman. Trial of this action resulted in the entry of a judgment upholding the validity of the trust which Emma Holman had created. In its findings which formed the basis for the judgment the trial court found that Emma Holman was entirely competent at the time she made the trust agreement, that the trust was valid and the declaration of trust whereby it was created was fair and equitable, that it was not true, as alleged by Guy W. Holman in his cross-complaint, that his mother had agreed to deed the Santa Barbara property to him and to pay him the sum of $8,000 from the proceeds of the sale of the Orange county property, and that there was no agreement whatever between Guy W. Holman and his mother, Emma Holman, relative to the Orange county property at the time it was sold or at the time Emma Holman received the proceeds from said sale. One finding made by the court in said action deserves special mention. In paragraph III of his cross-complaint Guy W. Holman alleged "that said Sidney Holman by his last will and testament devised and bequeathed all of his property to his wife, Emma Holman, the plaintiff herein, to be held and used by her during her natural life, with power to sell any portion thereof that should be necessary for her proper maintenance and support, and upon the death of said Emma Holman, the plaintiff herein, all of said property was devised and bequeathed by said Sidney Holman to this defendant, to be his forever." With respect to the allegations thus made, the court found: "The court makes no findings as to the allegations of paragraph III of the cross-complaint for the reason that the terms of the will of the said Sidney Holman are adjudicated by the court in the decree of distribution of the estate of Sidney Holman, deceased."

Appellant's first contention is that the trial court in the present action erroneously determined that the issues herein had not been adjudicated in the prior suit to which reference has been made in the preceding paragraph. It is urged that the same issues predicated on precisely the same facts as those which appear in the instant proceeding were before the court in the former action. It is further contended that all matters involved in the issues offered in the prior action which might properly have been litigated and decided therein must be presumed to have been determined. It is particularly urged that respondent's right to a remainder interest in the proceeds derived from the sale of the 20-acre tract in Orange county was necessarily involved in the issues presented in the former suit, that it was respondent's duty as a defendant in said action to have asserted therein such right, and that a judgment having been rendered in said action which was unfavorable to him and which has long since become final is, therefore, conclusive upon his present claim to a right to a remainder interest in the proceeds obtained from the sale of the Orange county property. In this connection attention is directed to a declaration not infrequently found in adjudicated cases to the effect that a party may not with impunity litigate an asserted cause of action piecemeal.

[1] The principle of res judicata on which appellant relies is a most familiar and well-settled doctrine of the law. The rule is designed to prevent vexatious litigation and to require litigants to rest upon one decision in the controversy between them. 15 Cal.Jur. p. 98; Miller & Lux, Inc., v. James, 180 Cal. 38, 179 P. 174. The principle has been aptly described as one that is "indispensably essential to any well-regulated system of jurisprudence." Giuffre v. Lauricella, 25 Cal.App. 422, 143 P. 1061, 1064. It may further be conceded that in order to accomplish the laudable purpose of finality of litigation the doctrine has been extended to include not only matters actually determined by a judgment, but also every other matter which the parties might have litigated and have had decided as incident thereto or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense. Estate of Bell, 153 Cal. 331, 95 P. 372; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Henderson v. Miglietta, 206 Cal. 125, 273 P. 581; Ernsting v. United Stages, 206 Cal. 733, 276 P. 103.

The problem here presented is therefore whether or not the doctrine as above defined is applicable to the situation developed by the facts heretofore stated. The solution of the problem depends finally on a determination of whether or not it may be declared that respondent's right to a remainder interest in the proceeds derived from a sale of the Orange county property was a matter so essentially connected with the subject-matter of the prior action brought by Emma Holman through her guardian in 1926 that it could properly have been litigated in said action and there decided. As heretofore observed, this prior suit was instituted for the purpose of having the trust which Emma Holman had shortly theretofore created in the property declared invalid and annulled and the property which she had transferred to the trustee restored to her. The sole ground alleged in her complaint in said action for seeking the relief for which she prayed was her alleged incompetency at the time she created the trust. Respondent, as noted, was named as a defendant in the action and filed both an answer to the complaint and a cross-complaint. The answer admitted Emma Holman's incompetency. The cross-complaint alleged that he had consented to the sale of the Orange county property and had joined in the deed of conveyance pursuant to an agreement between himself and his mother whereby the latter agreed that upon completion of the sale she would first pay off the mortgage against the property and would then turn over to him $8,000 from the remainder of the cash proceeds and execute to him a deed of conveyance to the Santa Barbara property. The pleading further alleged that his mother did not perform her part of the agreement and that therefore from the time the sale of the Orange county property was consummated up to the date Emma Holman entered into the trust agreement with the First National Bank of Anaheim she held title to the Santa Barbara property and the sum of $8,000 in money in trust for him. In paragraphs II and III of the cross-complaint it was alleged that the Orange county property was community property of respondent's father, Sidney Holman, and his mother, Emma Holman, and that by his will Sidney Holman devised and bequeathed all of his property to Emma Holman for life with power in her to sell any part that might be necessary for her support and the remainder over to respondent.

It is apparent therefore that two main issues were presented to the court in the trial of the former action. These were, first, the alleged incompetency of Emma Holman when she created the trust, and, second, whether or not Emma Holman had made the agreement to turn over $8,000 in money and title to the Santa Barbara property to the respondent as consideration for his joining in the deed to the Orange county property. These two issues were determined adversely to respondent. The court expressly found that Emma Holman was fully competent at the time she created the trust and that the sale of the Orange county property was not made pursuant to the agreement alleged in the cross-complaint but on the contrary that there was no agreement at any time whatever between Emma Holman and the respondent relative to the Orange county property or the proceeds derived from its sale. The court further expressly refused to make any findings with respect to the allegations contained in paragraph III of the cross-complaint wherein Guy W. Holman alleged that he was entitled to a remainder interest in all of the property owned by his father at the time of his death and gave as its reason for such refusal that the terms of Sidney Holman's will had theretofore been adjudicated by the decree of distribution of the estate of Sidney Holman, deceased.

Immediately following the last-mentioned finding, the court found that the Orange county land had been distributed by the decree of distribution which was made in the estate of Sidney Holman, deceased, as follows: "To Emma Holman, the plaintiff herein, an equal undivided one half interest thereof, absolutely as her own by operation of law, the same being her community interest, and the remaining one half interest to Emma Holman under the terms of said last will and testament, as follows: To be held and used by her in any manner she may see fit during her natural life, with power to sell any portion thereof that may be necessary for her proper maintenance and support, and upon her death to Guy Wescott Holman, the cross-complainant, to be his forever."

[2, 3] The decree thus made constituted a final adjudication of the terms of Sidney Holman's will as the trial court in said action No. 21000 correctly found. The effect of the decree in the probate proceedings was to vest a life estate in an undivided one-half interest of the estate of the deceased in Emma Holman with a remainder over in such interest in respondent, Guy W. Holman. Hardy v. Mayhew, 158 Cal. 95, 110 P. 113, 139 Am.St.Rep. 73; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; Colburn v. Burlingame, 190 Cal. 697, 214 P. 226, 27 A.L.R. 1374; Estate of Rath, Cal.Sup., 75 P.2d 509. There was no occasion therefore for the court in action No. 21000 to pass upon the right of Guy W. Holman, defendant and cross-complainant in said action, to a remainder interest in the estate of his father. This right had been finally adjudicated and determined by the decree of distribution. Respondent's right to a remainder was not incidental to or essentially connected with the subject-matter of said action No. 21000 and, in addition, such right had been fully adjudicated and determined by the decree of distribution which had become final long before action No. 21000 was instituted. Appellant's contention that the judgment in action No. 21000 constituted an adjudication of the issues involved in this proceeding is therefore entirely devoid of merit.

Appellant's second contention is that the present action is barred by the statute of limitations, that the trial court's finding to the contrary is improper, and that the judgment which amounted to a denial of appellant's plea of the bar of the statute is therefore erroneous and must be reversed. In support of this contention, appellant presents the following argument: The decree of distribution of the estate of Sidney Holman, deceased, distributed to Emma Holman a life estate in an undivided one-half interest in the Orange county property with a power to sell any portion that might be necessary for her support and a remainder over in such undivided half interest to respondent. Thereafter the owner of the life estate and the remainderman voluntarily joined in a deed to the Orange county property because they were able to consummate a sale of said property which they both considered was advantageous. Under these circumstances, the respective estates which respondent and his mother had in the undivided one-half interest in the Orange county property terminated when the deed of conveyance was executed. When Emma Holman, with the consent of respondent, received the consideration which was paid for the transfer, she was under the duty to account to the remainderman for his share and she therefore held a portion of such consideration in trust for the remainderman. When Emma Holman, on May

10, 1926, entered into the trust agreement creating an irrevocable trust and transferred to appellant's predecessor in interest the entire net proceeds of the sale of the Orange county property as trustee, she thereby repudiated the trust in which she held a portion of the consideration for the remainderman and the statute of limitations then began to run against the remainderman.

[4] It is apparent that the fundamental premise of the above-described course of reasoning is that, under the peculiar circumstances here presented, the respective estates which had become vested in the Orange county property by the decree of distribution terminated on the execution of the joint deed and did not continue in the proceeds which were derived from the sale of said property. It is conceded that the suggestion thus advanced is novel, that there is no authority directly supporting it, and that whatever authority there is upon the general question is contrary to the contention. Attention is called to the statement of the rule as given in Ruling Case Law and Corpus Juris. In the former the rule is thus stated: "As a general rule, in the case of a sale of the entire property, the tenant for life and the remainderman take the same interests in the proceeds, respectively, as they had in the property, the income going to the life tenant and the principal at his death to the remainderman." 17 R.C.L. p. 646, § 38. In the latter it is declared: "Where the entire estate is sold there must be an apportionment of the proceeds between the life tenant and remainderman which must be based upon the value of their respective interests at the time of the sale." 21 C.J. p. 962, § 99. It is, however, contended that all of the authorities cited in support of the rule are cases wherein the sales were involuntary and it is argued that on principle the rule should be different where the sale of the property was voluntary which is the situation here presented.

[5] It may be conceded that upon the sale of the Orange county property and the joint execution by the life tenant and remainderman of the grant deed to the purchaser the respective estates in the particular property thus conveyed terminated. Necessarily this must be true. The grantee named in the deed thus executed became the owner of the absolute fee title to the property. Undoubtedly the life tenant and remainderman might then have divided the proceeds of the sale between them or they might have made some agreement regarding a future division of the proceeds whereby they would have indicated an intention that the respective estates which had existed in the real property should not continue in the proceeds. Salles v. Loane, 204 Cal. 55, 266 P. 538. However, they followed neither of these courses. The respondent in his cross-complaint in action No. 21000 asserted that there was a certain agreement between his mother and himself respecting a division of the proceeds. As heretofore pointed out, the presence or absence of such an agreement was one of the main issues presented in such prior action wherein appellant's predecessor was a party defendant. This issue was decided adversely to respondent by an express finding that neither the agreement alleged nor any other agreement respecting a division of the proceeds was made. The entire proceeds of the sale including fee title to the Santa Barbara property were turned over to Emma Holman, the owner of a life estate in an undivided half interest in the Orange county property with the consent of the owner of the remainder in such undivided half interest.

[6-8] Under these circumstances, no good reason appears why the general rule to which reference has heretofore been made should not be applicable. See In re Oertle, 34 Minn. 173, 24 N.W. 924, 57 Am. Rep. 48, and Thompson v. Thompson, 107 Ala. 163, 18 So. 247. The execution of the joint deed is not important since separate deeds might have been executed conveying to the purchaser the respective estates which existed in the property and thereby the same result would have been achieved. The fact that the proceeds of the sale were turned over to the life tenant and retained by her with the consent of the remainderman is not indicative of an abandonment of his right to share in such proceeds in the absence of an agreement to that effect. There is, moreover, no occasion for attempting to work out a trust relationship between the life tenant and the remainderman in such proceeds. It must be borne in mind that the testamentary instrument which created the two estates in the Orange county land expressly provided that the life tenant should have the "power to sell any portion thereof" that might be "necessary for her proper maintenance and support." Obviously it was the testator's intent that the life tenant should have the right to consume the entire estate if the necessity should arise and the decree of distribution which faith-

fully followed the language of the will recognized the testamentary intent so clearly expressed and conferred upon the life tenant the wide power granted by the will. It was entirely reasonable that when the land was sold the proceeds of the sale should be held and retained by the life tenant who had the undoubted right to use any part or all of such proceeds for her proper maintenance during her life. As to one-half of such proceeds, she could make whatever disposition thereof she wished since by the decree of distribution such an interest had been distributed to her absolutely. As to the remaining one-half, she continued to have exactly what the decree of distribution gave her which was a life estate with the power heretofore mentioned. Having the dominion and control of the entire proceeds, she could unquestionably transfer to a third party all thereof but as to one-half of the proceeds such transfer would be effective only as to the interest which she held therein which was a life estate and the transferee would take only what she could lawfully convey which was a life estate. Civ.Code, § 1108; Hall v. Wright, 17 Cal.App. 502, 120 P. 429; 16 Cal.Jur. p. 373, § 10, p. 375, § 12. The trial court correctly determined that upon the death of Emma Holman the respondent as remainderman was immediately entitled to have one-half of the proceeds derived from the sale of the Orange county property less the amount shown to have been paid by the life tenant in satisfaction of the mortgage on the Orange county property to secure payment of a personal obligation of respondent.

[9] Appellant further complains because the trial court adjudged that it should pay simple interest at the rate of 7 per cent. per annum in its individual capacity and not as trustee on the sum of $11,794.95, which was the amount found by the court to be due to respondent from June 24, 1933, the date of Emma Holman's death. That portion of the judgment which is thus made the object of special attack is as follows: "That Guy W. Holman do have and recover from the Bank of America National Trust and Savings Association, individually, interest on said sum of $11,794.95 from the 24th day of June, 1933, at the rate of seven per cent per annum, amounting now to $2,100.65." Respondent now concedes that he is not entitled to recover said sum of $2,100.65 awarded to him as interest as provided by that portion of the judgment last quoted.

It is therefore ordered that the portion of the judgment of the trial court which awards to respondent interest in the amount of $2,100.65 be vacated and stricken therefrom. In all other respects said judgment is affirmed. Remittitur to issue forthwith.

I concur: BARNARD, P. J.

Justice MARKS deeming himself disqualified does not participate in this opinion.

25 Cal.App.2d 429

DE MATTOS v. McGOVERN et al.

Civ. 10755.

District Court of Appeal, First District, Division 2, California.

March 21, 1938.

1. Specific performance ⚷39

An employee was not entitled to specific performance of alleged oral contract by employer to will employee one-third of his property, notwithstanding allegations that regular compensation was inadequate and employee remained in employment in reliance upon employer's promise, and that employer represented that he had already made will in accordance with contract. Civ.Code, § 1624; Code Civ.Proc. § 1973.

2. Frauds, statute of ⚷129(3)

The execution of a will is not part performance of alleged oral contract to make will, so as to take contract out of statute of frauds. Civ.Code, § 1624; Code Civ.Proc. § 1973.

3. Wills ⚷167

The right to revoke a will lies with testator until time of his death, and cannot be interfered with by equity unless limited by an agreement in writing. Civ.Code, § 1624; Code Civ.Proc. § 1973.

4. Frauds, statute of ⚷75

An agreement to make a will, to leave property by deed or will, or to revoke a will already made, is invalid under statute of frauds unless in writing. Civ.Code, § 1624; Code Civ.Proc. § 1973.

5. Frauds, statute of ⚷138(4)
Specific performance ⚷39

An oral agreement to make a will or to leave property by deed as compensation for services rendered, or to be rendered, is not enforceable as such, but remedy is quantum meruit for value of services rendered. Civ.Code, § 1624; Code Civ.Proc. § 1973.

6. Equity ⚷62

Equity follows the law, and when the law determines the rights of the parties, equity may not decree relief which the law denies.

7. Specific performance ⚷5

Equity may not grant specific performance of a contract where law gives party an adequate remedy for damages for breach of contract or compensation for services rendered thereunder.

8. Specific performance ⚷127(1)

In lieu of enforcing specific performance, equity may impress a trust for purpose of enforcing a valid contract.

9. Executors and administrators ⚷431(2)

Before promisee may maintain an action to recover reasonable value of services rendered under oral contract to compensate by will, he must file claim against the estate.

10. Equity ⚷87(3)

Equity will not come to the aid of one who, through his own delay and his own fault, has lost remedy provided by law.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Suit for specific performance of contract to will property by John De Mattos against J. C. McGovern, individually and as administrator of the estate of James Frazer, deceased, and others. From a judgment for defendants following order sustaining demurrers to the complaint, plaintiff appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

C. B. Wooster, of San Jose, and Ross & Ross and A. H. McGovern, all of Redwood City, for respondents.

NOURSE, Presiding Justice.

The plaintiff by this action sought to invoke the equitable jurisdiction of the trial court by praying a specific performance of an alleged oral contract wherein James Frazer, now deceased, promised to bequeath to plaintiff in his will one-third of his estate in compensation for services rendered, and to be rendered, to him by the plaintiff as an employee. It is also alleged that at some time during the employment, the deceased informed plaintiff that he had actually executed a will in accordance with the foregoing promise. A demurrer to the complaint was sustained without leave to amend, and plaintiff has appealed from the judgment which followed that order.

The complaint alleges that James Frazer died on September 10, 1934, leaving an estate in excess of the sum of $485,000. For many years next immediately preceding his death, the deceased had been engaged in the ownership and control of a mercantile business in the city of Palo Alto, this state, and plaintiff was actively employed by the deceased in the conduct of that business. It is alleged that for the purpose of inducing plaintiff to continue in his said employment, the deceased promised him that he would bequeath to him by will an amount equal to one-third of all his property, and that he had actually executed a will to that purpose. It is alleged that the compensation paid to the plaintiff for his services was grossly inadequate, and that he remained in the employ of the deceased because of and in reliance upon said promise and representation above noted. Allegations followed covering the proceeding in probate, the appointment of an administrator, the absence of a will, the appearance of all those claiming as heirs at law of the deceased, and the proceedings seeking distribution of the entire estate to those claiming heirship. Upon these allegations the plaintiff joined as parties defendant, the administrator and all those claiming heirship, and prayed that the court determine that he was entitled to distribution of one-third of the estate, that a trust be impressed upon the property of the deceased to that extent, and for general equitable relief. It is not alleged that plaintiff filed a claim against the estate at any time.

On this appeal appellant states as questions involved: Whether an executed oral agreement to will a certain portion of an estate is enforceable in equity, notwithstanding the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure; whether the complaint in the instant case states facts sufficient to confer upon the court jurisdiction to grant equitable relief by way of specific performance of the agreement pleaded; and whether in such a proceeding it is a necessary prerequisite that a claim be filed against an estate within the time required by law. The first and second questions are answered in the negative with the observation that we disregard the word "executed" added to the first question because of the settled rule that this proceeding does not involve an "executed" oral agreement. The third question is answered in the affirmative upon the authority of Morrison v. Land, 169 Cal. 580, 585, 147 P. 259.

[1-3] The main difference between this case and those which have gone before is that the appellant herein insists that, notwithstanding his failure to pursue the regular remedy which the law has given him, he should be permitted to invoke the equity jurisdiction to give him the relief which the law denies. On the theory that because he continued in the employment of the deceased in reliance upon the alleged agreement that agreement was partly executed he argues that the case is taken out of the statute of frauds. The premise is not sound. The services were rendered under a separate contract of employment. The same is to be said about the representation that a will had already been made in accordance with such an agreement. The execution of the will is not part performance of the alleged contract. Notten v. Mensing, 3 Cal. 2d 469, 474, 45 P.2d 198. The right to revoke a will lies with the testator until the time of his death, and, unless limited by an agreement in writing, equity cannot intervene. Notten v. Mensing, supra, 3 Cal.2d 469, page 473, 45 P.2d 198.

[4] The case is controlled by these settled principles: Under section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, an agreement to make a will, or to leave property by deed or will is invalid unless in writing. An agreement not to revoke a will already made is, in effect, the same as an agreement to make a will, and must also be in writing. Cazaurang v. Carrey, 117 Cal.App. 511, 517, 4 P.2d 259; Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198.

[5] An oral agreement to make a will or to leave property by deed in compensation for services rendered, or to be rendered, is not enforceable as such. The remedy is one in quantum meruit for the value of the services rendered. Zellner v. Wassman, 184 Cal. 80, 84, 87, 193 P. 84; Morrison v. Land, supra, 169 Cal. 580, pages 586, 590, 147 P. 259; Ruble v. Richardson, 188 Cal. 150, 154, 204 P. 572; Lauritsen v. Goldsmith, 99 Cal. App. 671, 675, 279 P. 168; Burr v. Floyd, 137 Cal.App. 692, 696, 31 P.2d 402.

[6] Equity follows the law and, when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies. 10 R.C.L., p. 382; Magniac v. Thomson, 15 How. 281, 299, 302, 14 L.Ed. 696; Federal Land Bank v. Wilmarth, 218 Iowa 339, 252 N.W. 507, 513, 94 A.L.R. 1338.

[7] Where the law gives a party an adequate remedy by way of an action in damages for breach of contract, or for compensation for the services rendered under it, a

court of equity may not grant specific performance of such a contract. Flood v. Templeton, 148 Cal. 374, 378, 83 P. 148; Morrison v. Land, supra, 169 Cal. 580, page 586, 147 P. 259.

[8] When the contract is valid a court of equity may, in lieu of specific performance, impress a trust for the purpose of enforcing the contract. Wolf v. Donahue, 206 Cal. 213, 220, 273 P. 547; Estate of Rolls, 193 Cal. 594, 599, 226 P. 608; Estate of Rath, Cal.Sup., 75 P.2d 509.

[9, 10] The appellant cites ten cases to the point that, notwithstanding the statutes requiring such contracts to be in writing, the courts have "relaxed the rule" to the extent that such oral contracts, though invalid, "may and will be enforced" in equity. Four of the cases cited came before the statutes were enacted; two involved an agreement in writing; the remainder denied relief in equity as well as at law. It is true that in some of these cases, as well as in others which might be cited, the courts have said that "under special circumstances" equity will entertain such cases "upon clear proof of fairness, justness and adequacy." Whether these expressions may be treated as postulates, dicta, or discursive colloquialisms, it is difficult to say, but it is significant that, in all these "reservations" of the power, there is no case cited wherein the power was exercised. There is, however, complete harmony in the cases holding to the rule that, where the oral contract to compensate by will was made in consideration of services rendered or to be rendered, the promisee's remedy is one at law to recover the reasonable value of his services. It is equally well settled that before the promisee may maintain an action for that purpose he must file a claim against the estate. Morrison v. Land, supra, 169 Cal. 580, page 585, 147 P. 259. Finally, no principle is more firmly settled than that equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law has provided.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

25 Cal.App.2d 434

In re FRAZER'S ESTATE.

DE MATTOS v. McGOVERN.

Civ. 10754.

District Court of Appeal, First District,
Division 2, California.
March 21, 1938.

1. Courts ⚷200¼

The probate court has no primary jurisdiction in equity, and may not grant equitable relief where party, through his fault alone, fails to pursue legal remedy afforded him.

2. Executors and administrators ⚷224

The probate court had no power to grant specific performance of testator's alleged oral contract to compensate employee by willing him one-third of the estate, where employee filed no claim and made appearance in probate proceeding long after time for filing had expired.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of James Frazer, deceased, on objections of John De Mattos to the petition for final distribution of J. C. McGovern, administrator of the estate of James Frazer, deceased, and prayer to specifically enforce oral agreement to compensate by will. From an adverse order, John De Mattos appeals.

Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

Ross & Ross and A. H. McGovern, all of Redwood City, for respondent.

NOURSE, Presiding Justice.

[1, 2] This is a companion case to De Mattos v. McGovern, this day decided, 77 P.2d 522. To the petition for final distribution De Mattos filed objections and a prayer to the probate court to specifically enforce the oral agreement alleged in the complaint in the former action. He did not file any claim against the estate and made this his first appearance in the probate proceeding long after the time for filing had expired. The appellant concedes that his pleading states no cause other than one for specific performance of the alleged agreement, and states that he knows of no rule of law which would require him to sue for a money judgment in lieu of enforcing his rights under the agreement. In Morrison v. Land, 169 Cal. 580, 586, 147 P. 259, 261, it is said: "It is elementary that where, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice." Since the probate court has no primary jurisdiction in equity it is powerless to grant equitable relief where the party has, through his fault alone, failed to pursue the legal remedy afforded him.

For these reasons, and for the reasons given in the companion case, the order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

25 Cal.App.2d 381

SEPULVEDA v. APABLASA et al.

Civ. 6002.

District Court of Appeal, Third District, California.

March 16, 1938.

Rehearing Denied April 15, 1938.

Hearing Denied by Supreme Court May 12, 1938.

1. Deeds 🔑38(1)

A deed was void for uncertainty, where it contained no definite or ascertainable description of the property intended to be conveyed.

2. Assignments 🔑8

An instrument was void, in so far as it purported to convey an interest in property which grantor expected to inherit from his mother's estate on her death. Civ.Code, § 700.

3. Deeds 🔑3

The right to sell property and to retain the proceeds of sale, or any part thereof, constitute acts which are entirely inconsistent with the parting of title or an intention to vest title to property by owner thereof in others.

4. Deeds 🔑3

An instrument which confers no right of either present or future possession cannot be deemed to pass any estate in the land.

5. Vendor and purchaser 🔑228(4)

The validity of a deed was not affected by grantee's notice of a prior void deed from grantor to third person.

6. Mortgages 🔑12

The beneficiary and trustee under a trust deed acquired no interest in property, where only attempt to designate property was reference to property which mortgagor acquired by virtue of trust created in will of his deceased father, but where there was no trust existing under will of his father.

7. Trusts 🔑35(1)

A grantee held title to land only as trustee for benefit of grantor, where he paid no consideration to grantor and thereafter permitted grantor to borrow money and otherwise treat the property as his own.

8. Costs 🔑201, 203

An item of costs was erroneously inserted in judgment in suit for declaratory relief, where notice was not given to defendants and there was no previous serving and filing of a memorandum of costs. Code Civ.Proc. § 1033, as amended by St.1933, p. 1902; § 1060.

9. Costs 🔑3

The allowance of costs being strictly statutory, prevailing party in suit may recover such costs only as statutes allow.

10. Costs 🔑12

The court is authorized to allow costs which are discretionary, only when that discretion is vested by statute in the court.

11. Costs 🔑3

Costs may be allowed only in manner provided by law.

12. Appeal and error 🔑1151(2)
Costs 🔑71

A plaintiff, who failed to comply with statute dealing with costs in respect to one item of costs, would be deemed to have waived that item of costs, and on appeal judgment would be modified by eliminating that item. Code Civ.Proc. § 1033, as amended by St.1933, p. 1902.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Suit by Ildefonso A. Sepulveda, also known as I. A. Sepulveda, as administrator of the estate of Concepcion Apablasa de Sepulveda, also known as Concepcion A. Sepulveda, deceased, against John V. Apablasa, also known as J. V. Apablasa, also known as John C. Apablasa, and another and O. J. Salisbury and others, for declaratory relief to construe an instrument. From an adverse judgment, O. J. Salisbury and others appeal.

Judgment modified and, as modified, affirmed.

W. W. Middlecoff, of Los Angeles, for appellants.

Frank S. Hemminger and Charles W. Partridge, both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment in a suit for declaratory relief under section 1060 of the Code of Civil Procedure to construe an instrument dated July 2, 1929, executed between Concepcion Apablasa de Sepulveda and Ildefonso A. Sepulveda, her husband, as parties of the first part, and the surviving children of Concepcion by her first husband, as second parties. The instrument was executed to settle a controversy existing between the parties thereto with relation to the titles to six parcels of land in Los Angeles county, which were then involved in a suit pending in the superior court of that county. It purports to "grant" to each of the second parties an undivided one-twelfth interest in each of said parcels of land, and to authorize a sale of the land at stipulated prices with an agreement to divide the proceeds of such sales in the proportions mentioned. Some of the grantees subsequently conveyed their interests.

Certain defendants, sued under fictitious names, became parties to this suit. Florence H. Morgan filed an answer claiming a judgment lien on the interest in said property belonging to John V. Apablasa, also known as John C. Apablasa. O. J. Salisbury, Donald H. Fry, and Emmett D. Browne, as trustee, jointly filed an answer in this suit, claiming interests in designated portions of the property by virtue of assignments thereof. Francis J. Conley, Eugene Anthony Conley, and Delia Apablasa, also jointly filed a separate answer in this suit, claiming interests in the property under a subsequent agreement executed May 4, 1929, by Cayetano J. Apablasa, one of the second parties to the agreement under construction herein.

August 9, 1931, Concepcion A. de Sepulveda died, intestate, in Los Angeles, and her husband, Ildefonso A. Sepulveda, was appointed administrator of her estate. A controversy arose over the respective interests of her heirs in the six parcels of land described in the instrument executed July 2, 1929. This suit was commenced January 6, 1934. After trial, the court adopted findings on the issues presented. The judgment determines that the instrument dated July 2, 1929, constituted a conveyance from Concepcion Apablasa de Sepulveda and her husband of an undivided one-twelfth interest in parcels 1, 2, 3, and 6 of the real property described in the findings to each of the following-named parties thereto, to wit: Maria Apablasa Conley, Concepcion Apablasa Finlay, Laura Apablasa Thesing, Candelaria Apablasa Bernstein, Cayetano J. Apablasa, and Charles C. Apablasa, and that they are the owners of those respective interests; that the instrument in question conveyed to Concepcion Apablasa de Sepulveda and her husband, Ildefonso A. Sepulveda, the remaining undivided one-half interest in parcels 1, 2, 3, and 6 of said property, together with the entire interest in parcels 2A, 4, and 5 thereof, and that the said husband and wife were the owners of the last-mentioned interests; that Concepcion A. de Sepulveda died seized of the shares in said property last mentioned and that her heirs inherited from her estate by right of representation the following shares in her said property, to wit, an undivided one-third interest to her surviving husband, Ildefonso A. Sepulveda; an undivided two-twenty-first interest each to her sons and daughters, John V. Apablasa, Maria Apablasa Conley, Laura Apablasa Thesing, Candelaria Apablasa Bernstein, Concepcion Apablasa Finlay, Cayetano J. Apablasa, and Alfonso T. Sepulveda; that the undivided one-twelfth interest in parcels 1, 2, 3, and 6 acquired by Charles C. Apablasa by the terms of the instrument dated July 2, 1929, was held by him in trust for the benefit of John V. Apablasa and his successor in interest, and not otherwise, which said last-mentioned interest was transferred to Burnand & Co., a corporation, which is the owner thereof subject to a judgment lien thereon in favor of Florence H. Morgan for the sum of $2,083.58 as provided by judgment book 11193, page 97, of judgments in the office of the county recorder of Los Angeles county; that the defendant O. J. Salisbury has no interest whatever in any of said property; that none of the defendants, Emmett D. Browne, as trustee, Charles Apablasa, Donald H. Fry, or Charles J. Apablasa, acquired title to any of said properties through the instrument dated December 7, 1931, and recorded in book 11264, page 172, of the official records of Los Angeles; that except as hereinbefore specified the following defendants have no title or interest in any of said property, to wit, Florence H. Morgan, Emmett D. Browne, as trustee, Burnand & Co., John H. Lee, Lutheran Hospital Society of Southern California, Delia Apablasa, Security Materials Company, Al Fletcher, Maria Lasseter de Apablasa, Security-First National Bank of Los Angeles, E. D. Tate, J. M. Levy, Frank W. Chapin, Helen S. Chapin, O. J. Salisbury, and Donald H. Fry. The judgment further provides that the plaintiff recover the sum of $600 as costs incurred in procuring a certificate of title to the lands in question, $500 of which sum shall become a first lien on the interest of John V. Apablasa in said lands, and the remaining $100 thereof to become a first lien on said lands belonging to Maria Apablasa Conley.

The following named defendants only have given notice of appeal, to wit, O. J. Salisbury, John V. Apablasa, Emmett D. Browne, as trustee for Charles Apablasa, Donald H. Fry and Charles C. Apablasa, and Florence H. Morgan.

The findings and judgment with respect to the construction of the instrument of conveyance, dated July 2, 1929, and the respective interests of the several appellants in the property in question are supported by the evidence, which is too intricate and involved to warrant a recitation thereof.

[1] The findings and judgment to the effect that the appellant O. J. Salisbury has no interest in the property involved in this suit are adequately sustained by the evidence. Salisbury claimed title to one-third of the interest of John C. Apablasa in the property by virtue of a purported deed of conveyance thereof which was executed February 13, 1929. We are of the opinion that deed was void for uncertainty. It contains no definite or ascertainable description of the property intended to be conveyed. It is apparent the instrument does not purport to presently convey the property to the grantee but reserves the consummation of that transfer to a future date. The instrument in question first recites that John C. Apablasa claims an undivided one-sixth interest in the property and estate of his deceased father, Cayetano Apablasa, in Los Angeles county, consisting of real and personal property, the legal title to which stands in the name of his mother, Concepcion Apablasa de Sepulveda, who claims to be the owner in fee thereof; that the grantor has commenced a suit to determine that his mother holds his said interest in said property, together with the rents, issues, and profits thereof, in trust for his benefit; that "John C. Apablasa desires to sell and O. J. Salisbury is willing to purchase one-third of the right, title, interest and estate which the said John C. Apablasa has, or may acquire" therein; that in consideration of $10, paid by the grantee, the grantor granted, bargained, sold, and transferred the one-third of his one-sixth interest, "less, however, the proportional share of any attorney's fees and the cost of suit which the said John C. Apablasa may be required to bear in perfecting his title to said interest in said property, estate, rents, issues, profits and proceeds: provided however, that in no event shall such interest in said property, estate, rents, issues, profits and proceeds, which is hereby conveyed by the said John C. Apablasa to the said O. J. Salisbury, be less than 21.6% of the gross amount or value of said property * * * the said John C. Apablasa now has or may hereafter acquire in any manner whatsoever."

The trial court found in regard to that instrument:

"That said deed of conveyance of interest in property did not transfer and was not intended by the parties thereto to transfer a present interest in any of the property described within paragraph VI hereof."

The court further found in regard thereto:

"That the defendant O. J. Salisbury * * acquired no interest in the property described in paragraph VI of the Findings of Fact by reason of the agreements and the power of attorney executed."

[2] In so far as the instrument purported to convey to Salisbury an interest in the property which John C. Apablasa expected to inherit from his mother's estate upon her death, it was void. Section 700, Civ.Code; In re Estate of Wickersham, 138 Cal. 355, 70 P. 1076, 71 P. 437; 9 Cal.Jur. 281, § 149.

From the language of the instrument it is apparent that the parties did not intend thereby to consummate a present conveyance of the property. Under the terms of that instrument, it was impossible to determine what property was to pass to the grantee until all litigation was completed and a deduction of all attorney's fees and costs of perfecting the title of John C. Apablasa were first ascertained and made. Other evidence in the record confirms this conclusion.

[3, 4] As is said in Scott v. Woodworth, 34 Cal.App. 400, at page 407, 167 P. 543, 545:

"The right to sell the property and to retain the proceeds of sale, or any part thereof, constitute acts which are entirely inconsistent with the parting of title or an intention to vest title to the property by the owner thereof in others. Obviously 'an instrument which confers no right of either present or future possession possesses little of the character of a conveyance, and can hardly be deemed to pass any estate in the land.' McMillan v. Richards, 9 Cal. 365, 410, 70 Am.Dec. 655; Fogarty v. Sawyer, 17 Cal. 589."

[5] The trial court determined in this action that the defendant Burnand & Co., a corporation, is the owner by virtue of the sheriff's deed thereto which was executed to it December 21, 1931, of the entire interest of John C. Apablasa in the property which he inherited from the estate of his mother, Concepcion Apablasa de Sepulveda, subject, however, to a judgment lien on parcels 1, 2, 3, and 6 thereof, in favor of the defendant Florence H. Morgan for the payment of $2,083.58, as shown by the record in judgment book 11193, page 97, of judgments in the county recorder's office of Los Angeles county. The appellants contend that the title to this property in Burnand & Co. is void for the reason that the corporation accepted its deed of conveyance with notice of the former purported deed from John C. Apablasa to O. J. Salisbury acquired by the recording of a power of attorney between the last-mentioned parties which refers to the deed. As we have held, since the purported deed to Salisbury was void and conveyed no title, the notice thereof which was given by the recording of the power of attorney could neither confer title nor add to the validity of the instrument. It follows that the findings and judgment in favor of Burnand & Co. are adequately supported by the evidence.

[6] The appellants Fry and Browne, as trustee, claim that the findings and judgment to the effect that they acquired no interest in the property are not supported by the evidence. It is asserted that Emmett D. Browne, as trustee for Donald Fry, acquired title to the entire interest of John C. Apablasa, also known as John V. Apablasa, in the property in question, to secure the payment of various loans of money which he procured, aggregating the sum of $7,000, by virtue of a deed of trust executed by John Apablasa on December 7, 1931. We think not. The instrument relied upon is too indefinite and uncertain with respect to the property sought to be conveyed. The only attempt to designate the property affected thereby refers to "all his [John V. Apablasa's] right, title and interest in and to any and all property, both real and personal, and wheresoever situate," which he acquired "by virtue of the trust created in the will of the said Cayetano Apablasa," his deceased father. In paragraph XIII of the findings of fact, the court determined "That there was not on said date, nor at any time thereafter, a trust existing under the will of Cayetano Apablasa," and that no title to property vested in these appellants on that account, or otherwise. There is ample evidence to support that finding. We are of the opinion this disposes of their appeal and that the findings and judgment are sufficiently supported in that regard.

[7] We are of the opinion the findings and judgment to the effect that the appellant Charles C. Apablasa, also known as Charles J. Apablasa, held no title to the property in question except as a trustee for the benefit of John V. Apablasa, are supported by the evidence. The court determined that Charles paid no consideration for John's one-twelfth interest in the property, and that by Charles' conduct in thereafter permitting John to borrow various sums of money on his said interest and in otherwise treating the property as his own, Charles was estopped from asserting that the instrument which he held with relation to the property constituted a conveyance thereof to him. Those findings are adequately supported by the evidence.

The notice of appeal specifically assigns as error that portion of the judgment which provides that:

"The plaintiff have and recover the sum of $600.00 of his expenditures for title search; the sum of $500.00 thereof to be a lien and charge in favor of the plaintiff, prior to all the liens and claims of the parties hereto, and to be first paid from the proceeds thereof, upon such interest as the defendant John V. Apablasa * * * would have had in the said estate of Concepcion A. Sepulveda, deceased; * * * the sum of $100.00 thereof to be a lien and charge in favor of the plaintiff, prior to all of the liens and claims of the parties hereto, and to be first paid from the proceeds thereof, upon the interest of Maria Elizabeth Apablasa Conley, * * * as an heir at law in the estate of Concepcion A. Sepulveda, deceased."

[8-11] Within five days after notice of the rendering and entry of the judgment in this case, the appellants served upon the plaintiff and filed, under the provisions of section 1033 of the Code of Civil Procedure, as amended by St.1933, p. 1902, a motion to retax and disallow the item of alleged costs inserted in the judgment on the grounds that it was improperly allowed and that a memorandum of costs was not served upon the appellants or filed in the suit. An affidavit

to that effect was filed and considered at the hearing of the motion to retax costs. No counteraffidavit was filed therein. There is no evidence to support this item of costs. It does not appear it was a necessary item of expense incurred by the plaintiff. It affirmatively appears it was inserted in the judgment without notice to the appellants and without the previous filing of a memorandum of costs. Assuming that it may be a proper item of costs to be allowed under appropriate circumstances, it was erroneously inserted in the judgment in this case without notice to the appellants and without the previous serving and filing of a memorandum of costs. The motion to retax costs by disallowing the item was erroneously denied. The allowance of costs is strictly statutory. The prevailing party in a suit may recover such costs only as the statutes allow. The court is authorized to allow costs which are discretionary only when that discretion is vested by statute in the court. 7 Cal.Jur. 254, § 2. Costs may be allowed only in the manner provided by law. Section 1033 of the Code of Civil Procedure, as amended, provides that a memorandum of costs must be served and filed within five days from "notice of the entry of judgment." This was not done.

In the case of Griffith v. Welbanks & Company, 26 Cal.App. 477, 147 P. 986, 988, in affirming an order striking from the records a memorandum of costs which was not filed within the time allowed by statute, the court said:

> "The terms of said section [1033, Code Civ.Proc.] are mandatory, and a substantially strict compliance therewith is required. * * * If the one party fails, within the time prescribed, to file and serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor."

[12] In the present case, we are of the opinion the plaintiff waived his costs by failure to comply with the statute, and that the court erred in denying appellants' motion to strike the item of costs from the judgment. The judgment should therefore be and it is hereby modified by eliminating therefrom the item of costs.

As so modified, the judgment is affirmed, respondents to recover costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

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25 Cal.App.2d 390

SEPULVEDA v. APABLASA et al.

Civ. 6027.

District Court of Appeal, Third District, California.

March 16, 1938.

Rehearing Denied April 15, 1938.

Hearing Denied by Supreme Court May 12, 1938.

1. Judgment ⚷788(1)

Where trust in which minors were interested was not recorded until after judgment in suit for declaratory relief was rendered in favor of an innocent purchaser of land for valuable consideration, without notice of minors' claims, minors were bound by the judgment. Code Civ.Proc. § 473, as amended by St.1933, p. 1851; Civ.Code, § 1214.

2. Judgment ⚷386(2)

Motions to set aside judgment were properly denied on ground that they were not made within a reasonable time after entry thereof, where first motion was not made until lapse of year and eight months from entry of judgment and second motion was made two months later. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

3. Judgment ⚷338

If minors, claiming interest in property under a trust and making motions to have judgment involving property set aside, were not bound by judgment, their remedy was a separate suit in equity, where their motions were not made within a reasonable time after entry of judgment. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Ildefonso A. Sepulveda, also known as I. A. Sepulveda, as administrator of the estate of Concepcion Apablasa de Sepulveda, deceased, against John V. Apablasa, also known as J. V. Apablasa, also known as John C. Apablasa, and others, and John V. Apablasa, Jr., a minor, by John V. Apablasa, Sr., guardian of his estate, and others for declaratory relief to construe an instrument. From orders denying the motions of John V. Apablasa, Jr., a minor, by John V. Apablasa, Sr., guardian of his estate, and others, to set aside an adverse judgment, they appeal.

Orders affirmed.

Eugene Harrah, of Los Angeles, for appellants.

W. W. Middlecoff, Randall & Bartlett, Charles W. Partridge, and Stanley F. Maurseth, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal on the part of three minor children by their guardian, John V. Apablasa, from two separate orders of court denying their motions to set aside the judgment under the provisions of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, which judgment was previously rendered in the suit for declaratory relief, entitled Ildefonso A. Sepulveda, etc., v. John V. Apablasa, affirmed by this court on appeal therefrom. That opinion was this day filed and appears at page 526 of 77 P.2d. This proceeding was consolidated with the last-mentioned case for the purpose of appeal.

The appellant John V. Apablasa, Jr., is the minor son of John V. Apablasa, his guardian, who was a defendant in the suit for declaratory relief above mentioned, and the appellants Harry McGruder and Margaret McGruder are the minor grandchildren of said guardian, by his deceased daughter, Ophelia Apablasa McGruder. It is contended these minor children were necessary parties to the suit for declaratory relief as interested beneficiaries of a trust created by John V. Apablasa in his share of the property derived from the instrument of July 2, 1929, which was the subject of construction in the last-mentioned cause. The judgment was rendered in the action for declaratory relief, December 5, 1935. During the trial of that cause it was suggested by no one that these minors were necessary parties thereto. The first motion to vacate that judgment was made August 23, 1937, after the lapse of a year and eight months from the entry of judgment. The second motion to vacate the judgment on the same ground was made two months later. Both motions were denied.

The respondents assert that the alleged trust under which the minor children claim a beneficial interest is void for uncertainty because it contains no description of the property affected. It is also pointed out that this suit was commenced January 6, 1934; that a lis pendens was recorded September 26, 1935; that the alleged trust in which the minors were interested was not recorded until February 19, 1936, long after the judgment was rendered in this suit. It is asserted that none of the respondents ever heard of the alleged trust in question until John V. Apablasa first testified to it upon this trial. Even then no one suggested to the court that the minors were necessary parties to the action.

[1] We are of the opinion the minor children are bound by the judgment in this case. The respondent, Burnand & Co., succeeded to the entire interest of John V. Apablasa, as an innocent purchaser thereof for a valuable consideration, without notice of the asserted claims of the minor children. The claims of the minor children depend upon the title of John V. Apablasa in the property in question. It has been determined his title passed to Burnand & Co. This suit involving the title to the property was filed and the lis pendens was recorded long prior to the recording of the alleged trust under which the minors claim an interest therein. Section 1214 of the Civil Code provides that:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

[2, 3] Moreover, the motions to set aside the judgment were properly denied for the reason that they were not made within a reasonable time after the entry thereof. Smith v. Jones, 174 Cal. 513, 163 P. 890. In the case last cited it is held that a motion to set aside a judgment, not void upon its face, which is presented more than one year after the rendering of judgment, is too late and the court has no power under such circumstances to grant the application. If the minor children are not bound by the judgment in this case, they have their remedy in a separate suit in equity.

The orders are affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

25 Cal.App.2d 394

MOST v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 11696.

District Court of Appeal, Second District, Division 1, California.

March 17, 1938.

Hearing Denied by Supreme Court May 16, 1938.

1. Depositions ⚷7

Under statute authorizing taking of deposition of witness who is party to action, in "action" at any time after service of summons or appearance of defendant and in "special proceeding" after question of fact has arisen, a majority stockholder, of corporation against whom suit had been brought by minority stockholders for declaration of constructive trust in connection with exchange of their stock and for accounting, wherein majority stockholder asserted that no trust had arisen, was required to answer questions propounded on taking of deposition as to disposition of minority stock as against contention that questions were not required to be answered, before trust relationship had been established, since suit was an "action" as distinguished from "special proceeding" within statute, and questions were material to possible issue of accounting which might arise under pleadings. Code Civ.Proc. § 2021.

[Ed. Note.—For other definitions of "Action; Action at Law" and "Special Proceeding," see Words & Phrases.]

2. Depositions ⚷64(2)

In suit by minority stockholders against majority stockholder of corporation for declaration of trust in connection with exchange of stock and for accounting, question whether majority stockholder was required to answer questions on taking of deposition relating to disposition of minority stock was not to be determined by whether issue of accounting might come to be tried but whether questions asked would be material to issues raised by accounting in event such issues might come before trial court under issues as framed by pleadings. Code Civ.Proc. § 2021.

◆

Original proceeding for a writ of prohibition by Stanley Most against the Superior Court of the State of California in and for Los Angeles County, and another.

Alternative writ discharged and peremptory writ denied.

Irving S. Baltimore and Mitchell, Silberberg, Roth & Knupp, all of Los Angeles, for petitioner.

Pacht, Pelton, Warne & Black, of Los Angeles, for respondents.

WHITE, Justice.

By a petition for a writ of prohibition petitioner challenges the right and jurisdiction of the superior court to adjudge a defendant in an action guilty of contempt for his refusal to answer interrogatories in a proceeding regularly instituted by the plaintiff to take his deposition under the provisions of section 2021 of the Code of Civil Procedure.

Briefly, the amended complaint alleges that plaintiffs were minority stockholders of certain New York corporations, all engaged in the manufacture and sale of certain bronze products; that defendants, including the petitioner herein, were the majority stockholders and were actively in charge of the management of the corporation, were in control of the board of directors, and were the corporation's managing officers. The amended complaint then goes on to allege that during the year 1927 a projected plan was proposed to merge with another corporation the corporations in which plaintiffs and defendants had their respective stock interests, through the sale by plaintiffs and defendants of their stock interests to the new corporation. It is then alleged that defendants, including petitioner herein, acted as agents and in a trustee capacity for plaintiffs in negotiating and consummating said merger and the sale of their stock holdings. It is alleged that about December, 1927, the defendants stated to plaintiffs that said transaction had been consummated for a total price of some $324,000, and that $81,000 represented the total pro rata share to which the plaintiffs were entitled, being approximately one-fourth thereof, and that there was then paid to plaintiffs the sum of $81,000, which they accepted; and, according to the amended complaint, their acceptance was based on the fact that they fully believed the statements and representations and relied upon their agents and trustees, who were the defendants. It is then alleged that the transaction in truth was not a cash one, but that the defendants received certain common and preferred stock in the new corporation which defendants sold for a sum alleged upon information and belief to have been in excess of $2,000,000. It is further alleged that plaintiff had no knowledge of the terms and conditions of the sale, and relied solely on the statements and representations of the defendants, and that plaintiffs did not discover the alleged breach of trust until some time during the year 1933. By their amended complaint the plaintiffs seek a declaration by the court that a constructive trust exists and existed in favor of plaintiffs in connection with the transactions above referred to, and pray that defendants, including the petitioner herein, be required and directed to account to plaintiffs for the property, income, and profits of the aforesaid transaction. There is a second cause of action contained in the amended complaint which is not pertinent here, for the reason that no questions were asked regarding the allegations peculiar thereto.

To the aforementioned amended complaint petitioner herein, as a defendant, filed his answer, which, among other things, denied the existence of any trust and alleged an outright sale of plaintiffs' stock to the defendants named in the action.

[1] The questions asked of petitioner herein upon the taking of his deposition, and which he refused to answer, and for which refusal he was adjudged in contempt, and in connection with which the superior court proposes to pronounce judgment against him, go to the point of what happened to the stock which petitioner received in the transaction above referred to, whereby the original companies in which the parties were interested transferred their assets to the new corporation, and seek to trace the sale of the alleged trust assets by petitioner through their various mutations and into their present form. Epitomized, plaintiffs seek through the questions propounded to petitioner to prove and establish by the latter what he did with the property he acquired from plaintiffs, and in what form and under what name he now holds it, as well as the value and character of such property.

Petitioner resists the jurisdiction of the superior court to compel him to answer the interrogatories on the ground that the primary issue as framed by the pleadings is whether an agency relationship was created between the plaintiffs in this case and the petitioner as a defendant; that, because defendants deny the existence of any agency relation and allege an outright sale of the stock in question by plaintiffs to defendants for which the former were paid a fixed purchase price, before petitioner herein as a defendant can be interrogated as to what his assets are or what he did with the proceeds of the stock which he received as a result of the merger in question, it must first be established that there was a trust relationship either by reason of an agency or by reason of some other relationship existing between the plaintiffs and the defendants which bound them, including petitioner, to the plaintiffs in a fiduciary capacity. Petitioner argues that until this trust or fiduciary relationship is established the plaintiffs have no right to interrogate petitioner as to what he did with any assets he may have received as a result of the merger or as to what he did with the stock of the plaintiffs, or as to what became of the proceeds of said stock. This objection of petitioner is not well taken. Section 2021 of the Code of Civil Procedure provides that "the testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein" when the witness is a party to the action. In the case before us, it conclusively appears that the witness whose deposition was sought to be taken was a party to an action as distinguished from a special proceeding; that he had appeared therein; and the statute in plain and explicit terms provides that the testimony of such witness may be taken by deposition in an action at any time after his appearance.

Petitioner's contention that before he can be interrogated with reference to the assets upon which a trust is sought to be impressed the plaintiffs must first establish the existence of such a trust or other fiduciary relationship is without merit. In Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879, it was held that the superior court has jurisdiction to adjudge a defendant guilty of contempt for his refusal to answer interrogatories in a proceeding instituted by plaintiff to take his deposition after the sustaining of a general demurrer to the complaint with leave to file an amended complaint. It was there held that the filing of the complaint constitutes the bringing of the action, and the plaintiff's right to have the defendant's deposition taken depends, not alone upon whether it is material to issues ten-of action, one based on breach of warranty and the other charging negligence, and prayed for damages in the sum of $20,000. Defendants' answer denied the allegations of the complaint, and set up a defense of contributory negligence. The trial court found that there was a breach of implied warranty running to plaintiff, and that defendants were guilty of negligence as alleged, and awarded plaintiff damages in the amount of $750. From that judgment defendants appeal, claiming that the findings of the trial court are not supported by the evidence.

[1, 2] In December of 1933, Dr. Dryden, respondent's husband (respondent being present), purchased at a neighborhood grocery store, for consumption by himself and his family, a loaf of wrapped, sliced rye bread baked by appellants. A portion of the loaf was served at respondent's table that evening, and was found to contain what was assumed to be grit. The bread was served toasted for breakfast the following morning, when it was again found to contain some gritty substance. The respondent testified that she ate one slice of the bread at the evening meal and two or three slices of the toast in the morning, prior to the discovery by her husband, on eating some of the toast, that the supposed "grit" was glass. Appellants assert that the bread contained caraway seeds, and that the gritty substance may have been these seeds and not necessarily glass. Upon discovering the "glass" in the bread he had partly masticated, respondent's husband expelled that portion from his mouth and submitted it, with the remainder of the loaf—possibly eight slices still in the original cellophane wrapper—and several slices of the toasted bread, to a chemist for examination. At the trial, the expert testified that he "made one composite sample composed of a portion of each of these slices. * * * So the sample examined was a composite sample of all the remaining slices of bread in the package." A separate analysis was made of the toasted bread and likewise of the portion that had been partially masticated, and particles of glass were found in each sample examined.

Appellants contend that, since glass was not found in every slice of the bread, the finding of the trial court that plaintiff actually swallowed glass is unsupported by the evidence. In view of the report of the chemist and of the fact that respondent, as well as other members of her family who partook of the bread, detected the "gritty substance," which her husband found to be glass, it is reasonable to assume that respondent did actually swallow glass in the bread eaten by her, and the trial court was justified in so finding. It is elementary, of course, that all reasonable inferences and assumptions must be indulged in to support the judgment.

[3] It was alleged in the complaint that as a result of eating the bread containing glass, plaintiff suffered the following injuries: Nervous shock, mental suffering and agony, inflammation of the stomach and intestines, and sharp cutting pains in the region of the stomach and intestines, which allegation the lower court found to be true. Appellants attack this finding on the ground that the record contains no evidence that respondent ever suffered physical or other actionable injury from the presence of glass in her system, and that her own physician testified he could not detect any glass in her system. Respondent's testimony discloses that, within a day or so after eating the bread, she suffered from indigestion and abdominal pains that continued for some months; that she had been working in an office and was unable to carry on this work continuously; that she worried and was unable to eat; she became nervous and irritable and lost weight, and the trouble finally resulted in chronic indigestion. Dr. Dryden testified as to the change in his wife's physical condition after eating the bread. "She gradually got worse up until about two weeks before she developed a regular chronic indigestion with acute pains in her stomach, and she was in ill health for a great many months afterward." This testimony is corroborated by that of her physician, Dr. Jones, who stated that when called by respondent's husband to examine her he found her in a "very nervous state," and that she complained of the irritation of the stomach and of indigestion, although at the time he could find no evidence, "from an outside examination," that she had swallowed glass. He also testified that "she had intestinal irritation due to her lack of eating properly * * * her resistance was lowered and on several occasions she was quite sick." This condition continued until respondent (in July or August of 1934) was compelled to undergo an operation due to other causes. Following the operation, during which he had examined the wall and lining of the stomach and intestines, Dr. Jones assured respondent that he could find no injury to

the intestines caused by swallowing the glass, whereupon respondent's health began to improve. Dr. Turner, whose offices adjoined those of Dr. Dryden, testified that he had known respondent, who was her husband's assistant or nurse, for a year and a half or two years prior to December, 1933; that subsequent thereto he noticed a change in her physical condition; that she was unable to do the office work and was "continually on the couch, complaining of intestinal pains"; that she rarely went to lunch, and told him she was unable to "keep meals on her stomach"; and that she was extremely nervous and irritable. In view of this and other corroborating testimony, the finding of the trial court that plaintiff suffered the injuries complained of was amply supported.

[4] In objecting to the finding of the lower court that there was a breach of implied warranty, appellants urged that it is indispensable to such an action that there be privity of contract, and, as respondent's husband was the actual purchaser, there was no such privity and therefore there was no implied warranty to respondent as to the character or quality of the bread sold, citing the case of Binion v. Sasaki, 5 Cal.App.2d 15, 41 P.2d 585. In view of our conclusion that the evidence supports the finding that appellants were negligent, we do not find it necessary to determine whether a wife may recover in an action ex contractu for breach of an implied warranty in the sale of foodstuffs made to her husband. Assuming that privity is an essential element of such an action, it might well be urged that the wife, under the circumstances here disclosed, was a third party beneficiary of the contract. It is a well-settled rule that one not a party to an implied warranty in the sale of foodstuffs may recover in tort in the event negligence be shown. 17 A.L.R. 709; 39 A.L.R. 1000; 42 A.L.R. 1255; 60 A.L.R. 371.

[5] Appellants urge that they were not guilty of negligence. They assert that more than ordinary care was observed in their bakery to protect bread from broken glass, and that the law has no fixed standard of care other than the general one that it must be such as a person of ordinary reason, prudence, and caution would use under the same circumstances, citing 19 California Jurisprudence 577, and the numerous cases there set forth. An examination discloses that these cases are not factually in point. In an action for damages for personal injuries caused by broken glass in a package of rolled oats purchased as food by plaintiff, the court, in passing upon the question of negligence, said: "It goes without saying that any food manufacturer intending his product for human consumption should exercise a very high degree of care to see that it is free from any foreign substance which, if swallowed, might cause bodily injury or death to the consumer. Fortunately such care is the usual rule. * * * However, in the process of manufacture, the most careful hand may become careless; a moment's inattention may allow some foreign substance of a harmful character to become mixed with the food, and in a large plant with numerous employees there are many opportunities for acts of negligence. The various steps in a system of manufacture, of course, are wholly under the control of the manufacturer. * * *

"In view of the above considerations, it seems only fair to presume that the presence of deleterious substance in a packaged food occurs through some negligent act of omission or commission on the part of the agents of the manufacturer." Linker v. Quaker Oats Co., D.C., 11 F. Supp. 794, 796. See, also, Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 116, 145 A. 700, holding that those engaging in the business of manufacturing food for consumption must use a high degree of care to see that the food is free from deleterious substances which may injuriously affect the user, and that even where all reasonable scientific methods are employed to obviate the presence of any injurious substances, "where such substances get into the product, whose presence there might possibly be due to that uncertain human quality—carelessness—somewhere along the line, the manufacturer is responsible to a member of the public injured thereby."

[6] The next contention of appellants is that where the doctrine of res ipsa loquitur is not claimed to apply, as in the present case, a defendant may not be held "guilty of negligence without proof of any specific negligent act or omission and in the presence of affirmative proof that defendant was guilty of no negligent act." In Rozumailski v. Philadelphia Coca-Cola Bottling Co., supra, plaintiff swallowed glass which he testified came from a bottle of Coca-Cola served to him at a restaurant. The points chiefly urged on appeal were that the evidence was insufficient to prove

negligence and that the lower court invoked the doctrine of res ipsa loquitur to sustain the action. The court held that "the manufacturer was for all purposes in exclusive control of the bottle and its contents, as its contents were undisturbed until it reached the consumer's hands. *It is a case where the accident proves its own negligent cause,"* and negligence could be inferred "from the fact that ground glass had been found in the bottom of the bottle. The particular dereliction is not shown, nor was it necessary; the negligent act is demonstrated by showing glass in the bottom of the bottle." (Italics added.) It is our opinion that the trial court was correct in finding appellants guilty of negligence.

[7] The issue of contributory negligence as the proximate cause of the injury was properly disposed of by the trial court. Appellants' contention that respondent was highly negligent in continuing to masticate and swallow the bread after discovering the gritty substance therein, showing thereby a want of ordinary care, section 1714, Civ.Code, is without merit. This was obviously a question of fact for the trial court. See, particularly, Ternay v. Ward Baking Co., Sup., 167 N.Y.S. 562.

[8] Another objection of appellants is directed to the right of the respondent to recover for mental suffering without physical injury. As we have already held that the trial court was warranted in finding that plaintiff suffered the injuries complained of, this contention needs no discussion. Furthermore, even were the injuries confined to nervous shock, the right to recover for subsequent disturbances of the nervous system is settled by the decision in Sloane v. Southern Calif. Ry. Co., 111 Cal. 668, at page 680, 44 P. 320, 322, 32 L.R.A. 193, where this court said: "Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind." See, also, Lindley v. Knowlton, 179 Cal. 298, 176 P. 440. Definite nervous disturbances or disorders, caused by mental shock, excitement, and so on, are classed as physical injuries. 8 Cal.Jur. p. 772, citing the two cases last mentioned.

The judgment is affirmed.

We concur: SHENK, J.; HOUSER, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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11 Cal.2d 46

SCHALLER v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 16474.

Supreme Court of California.

March 24, 1938.

1. Workmen's compensation 🔑1939

Where findings made by Industrial Accident Commission are supported by substantial evidence, or by inferences which may fairly be drawn therefrom, even though the evidence be susceptible of opposing inferences, those findings will not be disturbed. St. 1917, p. 831, as amended.

2. Workmen's compensation 🔑1939

The question whether a worker is an employee within Compensation Act is one of fact on which judgment of the commission is conclusive where facts are in dispute, and is one of law only when but one inference can reasonably be drawn from the facts. St.1917, p. 831, as amended.

3. Workmen's compensation 🔑1939

Where two opposing inferences may be drawn from the evidence as to whether a worker is an employee within the Compensation Act, and inference accepted by the commission is reasonable, and is supported by evidence in the record, that inference must be sustained. St.1917, p. 831, as amended.

4. Workmen's compensation 🔑1349

In compensation proceeding, where there is proof that the injured person was at the time of injury actually performing services for the alleged employer, burden rests on the alleged employer to establish that the injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of the act. St. 1917, p. 831, as amended; p. 849, § 19(d)(1).

5. Workmen's compensation ⚿1461

In compensation proceedings for death of aerialist who was fatally injured while performing her act, where theatrical contractor had contracted to furnish an act to a show, deceased was a member of the troupe sent to the show, and contractor had contracted individually with each member of troupe so as to retain control over its personnel, evidence *held* to support commissioner's finding that deceased was an "employee" of contractor, within Compensation Act, and not an "independent contractor." St.1917, p. 831, as amended.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

6. Workmen's compensation ⚿305

In compensation proceeding, determination of question whether claimant was an employee or independent contractor depends on facts of each particular case. St.1917, p. 831, as amended.

7. Workmen's compensation ⚿1478

In compensation proceeding, where employee who was killed in course of employment left surviving a five-year-old child, evidence that employee had divorced child's father, that father's whereabouts were unknown, that father never had contributed to child's support, and employee, while working, contributed to child's support, although they lived with employee's parents when out of work, *held* to support commission's finding of "total dependency" of child upon employee. St.1919, p. 917, § 14(a) (2), (b), and St.1917, p. 831, as amended.

[Ed. Note.—For other definitions of "Total Dependency," see Words & Phrases.]

◆

In Bank.

Proceeding in certiorari by Jack Schaller, an individual doing business as Jack Schaller Attractions, against the Industrial Accident Commission of the State of California and John Barr, by his guardian ad litem and trustee, Leon Alric, to annul an award made against petitioner under the Workmen's Compensation Act by the Commissioner for the death of Sue Alric Marrion, deceased.

Award affirmed.

Jerome H. Kann, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

SEAWELL, Justice.

This proceeding in certiorari was instituted by petitioner, Jack Schaller, to secure the annulment of an award made against him by the Industrial Accident Commission for the death of Sue Alric Marrion, an aerialist who was fatally injured on May 7, 1936, during the performance of her act in a Canadian showhouse, when one of the ropes gave way at a height of 80 feet. The question is whether decedent was an independent contractor at the time of the accident, or whether she was an employee of petitioner.

For a number of years, so the record shows, petitioner, operating under the name of Jack Schaller Attractions, has conducted the business of theatrical or free attraction contractor. He maintains a place in Los Angeles furnished with acrobatic and aerial equipment which performers are permitted to use without charge in order to build up or rehearse an act, or maintain physical fitness. Petitioner does not supervise or direct the creation of an act, but he secures bookings, or contracts, for the performance of certain acts which are ready for the stage.

On December 29, 1935, petitioner entered into a written contract with the manager of the Conklin and Garrett All Canadian Shows. This contract provided that, in consideration of $225 a week to be paid to petitioner or his representative, petitioner would furnish to the Conklin Shows in Canada, for a period of nine weeks, with option for the remainder of the season, an act known as the 4 Queens of the Air, which act would be performed twice daily at a time designated by petitioner; that the troupe would put up and take down its own rigging; that, after the act joined the show, transportation would be furnished; that the manager of the act would be either Eddie Kunze or Milo L. Jones; that the manager would act as a substitute performer in the absence of any member of the troupe; that petitioner would hold the show "harmless on account of any accident or injury occurring to * * * (petitioner) or any of his employees, during any and/or all of said performances while engaged under the employment as provided in this contract";

and that, where conditions were not suitable for a standard performance without serious injury or loss of life to petitioner's "performers and employees," there should be no reduction in the salary or moneys due from the show.

At the time this agreement was executed, petitioner believed that he would be able to secure the services of either the troupe of aerialists managed by Kunze, or that managed by Jones. Later he found that neither the Kunze nor the Jones troupe would go to Canada. Meanwhile an aerial specialty act had been originated and organized by four women aerialists who had contacted each other while rehearsing at petitioner's place. Sue Alric Marrion was one of these four women. The aerialists called their act the "Four Aerial Queens," and they selected the husband of one of them to act as rigging man and substitute performer for the troupe. Petitioner told the troupe of the Canadian opening and they signified their willingness to fill the engagement. The Conklin Shows agreed orally to accept them as a substitute for the Kunze or Jones troupe under terms substantially as set forth in the written contract with petitioner. Petitioner thereupon made a separate oral agreement with each of the five members of the troupe; he did not contract with the troupe as a unit. His agreement with Sue Alric Marrion, similar to his agreement with the other troupers, was that she would perform her specialty act for twenty weeks for the sum of $600, performing to the best of her ability. Petitioner furnished a truck containing two bunks and equipment, and oil and gas sufficient to transport the troupe to the point where they joined the show. By mutual agreement it was arranged that payment of compensation would be handled in the following manner: The Conklin Shows had contracted to pay petitioner $225 a week for the act. The rigging man was selected to receive and disburse this sum as follows: $42.50 to petitioner for rent of equipment; $22.50 to petitioner as a 10 per cent. commission; $30 to each of the four women aerialists; $40 retained by the rigging man.

Petitioner testified that he did not consider the members of the troupe as his employees and that he carried no compensation insurance; that the performers were independent contractors; and that he acted only as their booking agent. He stated that he did not direct or supervise the formation of their act in any manner; that he exercised no control whatsoever over any detail of its performance; that Sue Alric Marrion, and each other trouper, performed her specialty as she saw fit, directed the installation of equipment for her use, and directed the manner in which the other performers were to assist her; that no member of the troupe controlled or directed any other member; that each performer made her own decision as to the duration of her act, the number of loops to be made, the kind, the height, and the tricks to be exhibited. Petitioner testified that the rigging man was not managing the act as his agent; that he was merely chosen by the troupe to perform certain duties for them, including the disbursement of compensation.

Petitioner stated that intoxication would be ground for breaking his contract with a performer, but otherwise he was without power to discharge where a performance was satisfactory according to the performer's own judgment. Petitioner gave as his reason for making a separate oral agreement with each performer, rather than a contract with the troupe as a unit, his desire to retain control over any change of personnel in the troupe; if one performer left, he could substitute another performer of his own choice. He stated that the troupe was bound to perform at the Conklin showhouses during the designated period, giving a specified number of daily performances at the times indicated by the show, and he could not have changed the troupe to other shows except by mutual agreement. Petitioner further testified that he was obligated to pay the aerialists according to his guarantee of $600 ($30 a week for 20 weeks), and that, regardless of what might happen to the Conklin shows, bankruptcy, for example, he would still have to pay.

The testimony given by other witnesses at the hearing, including members of the troupe, was of like import to that of petitioner. From this evidence the commission concluded that Sue Alric Marrion was petitioner's employee, and that her death resulted from injury sustained in the course of that employment.

[1-4] Where findings made by the commission are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence, even though the evidence be susceptible of opposing

inferences, those findings will not be disturbed by an appellate tribunal. Schramm v. I. A. C., 15 Cal.App.2d 475, 481, 59 P.2d 858; Hartford Accident & Indemnity Co. v. I. A. C., 202 Cal. 688, 693, 262 P. 309, 58 A.L.R. 1392; Archbishop v. I. A. C., 194 Cal. 660, 230 P. 1; Western P. R. R. v. I. A. C., 193 Cal. 413, 224 P. 754. The question of whether a worker is an employee within the meaning of the Compensation Act, St. 1917, p. 831, as amended, Act 4749, Deering's Gen. Laws, vol. 2, p. 2272, et seq., and Supps. 1933, 1935, is referred to as a question of mixed law and fact to be proved like any other question. Hillen v. I. A. C., 199 Cal. 577, 250 P. 570; LaFranchi v. I. A. C., 213 Cal. 675, 3 P.2d 305. It is a question of fact upon which the judgment of the commission is conclusive where the facts are in dispute. It becomes a question of law only when but one inference can reasonably be drawn from the facts. Where two opposing inferences may be drawn from the evidence, and the inference accepted by the commission is reasonable, and is supported by evidence in the record, that inference must be sustained. Schramm v. I. A. C., supra; Western P. R. R. v. I. A. C., supra; Archbishop v. I. A. C., supra. Moreover, in cases of this character the burden of proof rests upon an alleged employer to establish "that an injured person claiming to be an employee is an independent contractor or otherwise excluded from the protection of [the] act, where there is proof that such injured person was at the time of his injury actually performing service for the alleged employer." Compensation Act, supra, § 19(d) (1), St.1917, p. 849; Hillen v. I. A. C., supra; Murray v. I. A. C., 216 Cal. 340, 14 P.2d 301; York Junction Transfer & Storage Co. v. I. A. C., 202 Cal. 517, 261 P. 704; Metropolitan Casualty Ins. Co. v. I. A. C., 117 Cal.App. 369, 4 P.2d 190.

[5] In this case the finding of the commission that Sue Alric Marrion was an employee of petitioner, and not an independent contractor, must be sustained. Although petitioner repeatedly testified that he hired Sue Alric Marrion as an independent contractor, this was merely a statement of petitioner's own conclusion from the facts. Ostensibly certain features of the employment indicated a relationship of independent contractor, but these factors only served to create a conflict of evidence and opposing inferences to be drawn therefrom, which conflict the commission chose to resolve adversely to petitioner. If this court had been sitting as the trier of the facts, it is possible that an opposite conclusion might have been reached. On review, however, it cannot be said that the evidence established the relation of independent contractor as a matter of law. The conflicting evidence was clearly susceptible of two opposing inferences. The inference accepted by the commission was reasonable and amply supported, and therefore the commission's finding will not be disturbed.

[6] We may add that the evidence in this record has been reviewed in the light of various tests used in determining whether a relationship is one of employee or of independent contractor, such as the test of "complete and unqualified control," of "payment of wages," or of "right of discharge." While these tests are recognized as helpful, yet no special test, or fact, or circumstance has been found to give a conclusive answer to the question, and in the last analysis each case must turn upon its own peculiar facts and circumstances. Washko v. Stewart, 20 Cal.App.2d 347, 351, 67 P.2d 144; Hillen v. I. A. C., supra; Murray v. I. A. C., supra; George v. Chaplin, 99 Cal.App. 709, 279 P. 485; May v. Farrell, 94 Cal.App. 703, 710, 271 P. 789; Metropolitan Casualty Ins. Co. v. I. A. C., supra; Batt v. San Diego Sun, Cal.App., 69 P.2d 216; Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510; Winther v. I. A. C., 16 Cal.App.2d 131, 60 P.2d 342; Curcic v. Nelson Display Co., 19 Cal.App.2d 46, 64 P.2d 1153; 75 A.L.R. note, p. 725 et seq. Petitioner relies strongly upon the case of Brosius v. Orpheum Theater Co., 16 Cal.App.2d 61, 60 P.2d 156. That case could properly be cited in support of a contention that decedent's relation to the Conklin Shows was that of an independent contractor, and not of an employee, but the holding is inapplicable to the situation here under review.

The commission found that there was left surviving decedent, John Barr, her five-year-old son, a total dependent, and it awarded $4,446 for his benefit. Petitioner questions this finding of total dependency. Petitioner refers to evidence that since birth the boy had been cared for by his grandfather, who represents him herein as guardian ad litem and trustee, and petitioner complains that no proof was offered to show that the boy's father, who was legally liable for his support, was unable to provide adequately for him. The commission contends that the minor was entitled to the presumption of total dependency under section 14(a) (2) of the act, St.1917, p. 844, as amended by St.1919, p. 917, or that in any event the facts showed a total dependency under section 14 (b).

[7] We are of the view that there is to be found, in the conflicting evidence in the record, sufficient support for the commission's finding of total dependency. In support of the finding there was evidence that decedent had been divorced from the child's father; that the father had never contributed to the child's support; that in fact his whereabouts were unknown and efforts to locate him had proved fruitless. There was further evidence that, although decedent and the child had been on relief, and that when decedent was out of work they stayed with her parents, yet when decedent did have work she contributed to the child's support and the child was dependent upon her.

The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.

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11 Cal.2d 27

FARNSWORTH et al. v. HUNTER.

L. A. 16410.

Supreme Court of California.

March 24, 1938.

1. Pleading 🔑236(5)

In purchasers' suit for specific performance of contract for sale of realty, under evidence that realty was worth $1,250, whereas purchase price agreed on was only $650, permitting amendment of complaint to allege that property was worth $650 when contract was made and $1,250 when it was breached, and that purchasers were damaged by $600, for which they prayed judgment, was discretionary, where opportunity was given to introduce further evidence and to demand jury trial as to damages.

2. Jury 🔑13(13)

In purchasers' suit for specific performance of contract for sale of realty, where evidence was introduced that realty was worth $1,250, whereas purchase price agreed on was only $650, and purchasers were permitted to amend complaint to allege that property was worth $650 when contract was made and $1,250 when it was breached, and that purchasers were damaged by $600, for which they prayed judgment, vendor could demand jury trial on issue of damages.

3. Vendor and purchaser 🔑44

In purchasers' suit for specific performance of contract for sale of realty or for damages for breach thereof, evidence supported findings that vendor was competent and that consummation of contract was not induced by undue influence on vendor.

4. Vendor and purchaser 🔑351(1)

$600 was proper for vendor's breach, without cause, of contract for sale of realty, where purchasers made down payment of $100 on purchase price of $650 which was not returned, and property was worth $1,250.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Austin M. Farnsworth and another against Carrie L. Hunter, sometimes known as Caroline L. Hunter, for specific performance of a contract for the sale of realty, or for damages for the breach thereof. From a judgment for plaintiffs, defendant appeals, and plaintiffs move to dismiss the appeal or affirm the judgment.

Affirmed.

John H. Gordon, of Los Angeles, for appellant.

Richard F. Bailey and Ralph C. Curren, both of Los Angeles, for respondents.

WASTE, Chief Justice.

On January 28, 1936, defendant, Carrie L. Hunter, contracted to sell a lot owned by her in Los Angeles county to plaintiffs, Austin M. and Mildred C. Farnsworth, for the sum of $650. Plaintiffs paid $100 on account of the purchase price, and on March 17, 1936, tendered the balance. Defendant, however, refused to perform the contract on her part and convey the property. This action followed.

Plaintiffs' original complaint, filed April 7, 1936, alleged, in addition to the above facts, that the property was particularly suited to plaintiffs' purposes, and that the specified price was its fair and reasonable value as of the date of the purchase contract. The prayer of the complaint was that defendant be ordered to specifically perform said contract, and for general relief.

An answer to this complaint was filed on behalf of defendant which, among other defenses, pleaded inadequacy of consideration. Upon trial of the cause evidence was adduced to show that the reasonable market value of the property was greatly in excess of the specified purchase price. From this evidence the court drew the conclusion that at the time the purchase contract was executed, and also on March 17, 1936, when it was breached by defendant, the property was of the reasonable market value of $1,250; that therefore the agreed consideration was inadequate, and plaintiffs must be denied specific performance. Following this conclusion, the court, at the close of the evidence on August 14, 1936, ordered judgment for defendant with directions that the $100 paid by plaintiffs be returned to them, and ordered defendant's attorney to prepare findings. Before such findings were signed or entered, plaintiffs moved for permission to file an amended complaint to conform to proof. The motion was granted, and plaintiffs thereupon filed an amended complaint wherein they alleged that at the time of execution of the purchase contract the reasonable value of the property was the specified purchase price, but at the time of breach of said contract the market value of the property was $1,250, and that, as a direct and proximate result of defendant's refusal to convey in accordance with said contract, plaintiffs were damaged in the sum of $600. The prayer of this amended pleading was for specific performance, or, in the event plaintiffs were not entitled to that relief, for $600 damages for breach of contract.

Defendant demurred to the amended complaint, and also moved to strike the paragraph thereof containing the allegation of damage. The court overruled the demurrer and denied the motion to strike. Defendant then filed an amended answer. On January 22, 1937, the cause was resumed for further trial on the amended pleadings. As it then appeared that no further evidence was required or offered, by consent of both parties the cause was ordered submitted for decision. On January 25th the court filed a memorandum decision, and ordered judgment for plaintiffs in the sum of $600, which order was followed by the entry of formal findings and judgment denying specific performance but awarding plaintiffs $600 and costs. Defendant appealed. The cause is now under submission on motion of plaintiffs to dismiss the appeal or affirm the judgment, and on the merits. It is our view that the judgment should be affirmed.

The contentions of appellant may be summarized in the statement that she claims that all proceedings had upon the reopening of the cause were erroneous, and that the trial court erred in allowing plaintiffs to file an amended complaint which appellant contends did not in fact conform to proof but introduced a new and different cause of action, and prayed for new and additional relief.

Similar contentions were advanced in the case of Peters v. Binnard, 219 Cal. 141, 25 P.2d 834, and were found to be untenable. There the action went to trial on issues framed by a second amended complaint seeking damages for failure to cancel a note, and answer thereto. At the close of evidence, and while the cause was under submission, the trial court permitted the filing of a third amended complaint to conform to proof, which prayed for cancellation of the note, or damages. A motion to strike this amended pleading was denied, demurrer thereto overruled, and answer filed. Thereafter submission of the cause was set aside, further evidence taken, and the relief prayed by the amended pleading was granted. Discussing the questions raised on appeal as to the propriety of such procedure, this court said (219 Cal. 141, at pages 148, 149, 150, 25 P.2d 834, 837): "It is contended that the trial court erred in its order authorizing the filing of the third amended complaint. This contention is largely based on the apparent change of remedies found in the third amended complaint, and on the ground that new issues were brought in by this complaint. * * * It is, of course, elementary that the allowance or refusal of the trial court of permission to file amendments to pleadings to make them conform with the proof is a matter largely in the discretion of the trial court, and its exercise ordinarily will not be disturbed in the absence of gross abuse. Armstrong v. Lassen Lumber & Box Co., 204 Cal. 529, 269 P. 453. The third amended complaint did not bring in any new cause of action. A change by amendment from one kind of relief to another is not a change in the cause of action if the transaction is the same. Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038. Other than the change in remedy, the only new matter inserted in the third amended complaint was the change in the nature of the contract between Peters and the appellants, and that had been fully developed on the trial. Moreover, just how appellants were injured by permitting the new complaint to be filed does not satisfactorily appear. Assuming that new issues were thus introduced into the case, the trial court, after the new complaint had been filed and appellants had answered, permitted the taking of further evidence, and both sides introduced further evidence at some length. Appellants, therefore, had ample opportunity to present their evidence on any of these issues. * * * Appellants also contend that their demurrer to the third amended complaint should have been sustained. This contention is largely based on the theory that this complaint was for specific performance, and that the allegations contained therein are not sufficient to grant that relief. Some objection also seems to be made to the joining of a request for relief addressed to the law side of the court with a request for equitable relief. Under our system of Code pleading it is elementary that a plaintiff may blend with an action at law a petition for ancillary equitable relief. It is also quite clear that where a party is entitled to legal and equitable relief the whole matter should be litigated and finally settled in the same action." See, also, Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9; note 22 Cal.Law Review, p. 208 et seq.; 9 Cal. Jur.Supp. pp. 249, 250.

[1, 2] In the present case there is no showing of abuse of discretion on the part of the trial court in allowing the amendment to conform to proof. Although no evidence was taken upon the reopening of the cause, nevertheless both parties were accorded the opportunity to produce further proof. Appellant at that time could also have asserted her right to a jury trial on the issue of damages (see discussion 22 Cal.Law Review, pp. 216, 217, 218), but she chose to consent to submission of the cause. It cannot be said that appellant was prejudiced by the fact that, in order to establish inadequacy of consideration as a defense to specific performance, she was compelled to show a high value of the property and thus prove, by her own evidence, plaintiffs' right to damages. If appellant's evidence showing a value of $1,250 was true and was offered in good faith, then plaintiffs were in fact damaged in the sum of $600, and appellant's rights were not prejudiced. If appellant's evidence was offered wrongfully and deliberately to prove a false high value for the purpose of defeating plaintiffs' right to specific performance, then appellant cannot complain that this same false evidence worked to her disadvantage in the matter of plaintiffs' claim for damages. If a litigant proves the fair value of property for one purpose, he suffers no prejudice by not being allowed to prove, for another purpose, a different fair value. To protect such tactics would be to invite and condone perjury. Furthermore, appellant's answer to plaintiffs' amended complaint admitted that the market value of the property on March 17, 1936, date of breach of contract, was $1,250.

[3] Appellant pleaded, as further defenses to plaintiffs' claim, incompetency and undue influence. The trial court found against her on these issues. It found that the purchase contract was consummated as the result of negotiations between plaintiffs and a real estate agent representing appellant, and that plaintiffs never saw or talked with appellant until after execution of said contract. It further found that appellant, a widow 79 years of age, was in normal physical condition, was fully competent to understand business transactions, and completely understood the character, extent, and nature of the contract into which she entered with plaintiffs. The evidence fully supports these findings. Appellant herself took the witness stand and her testimony, in our opinion, would warrant no other conclusion than that she was competent at the time of the transaction here involved.

[4] The amount of damages awarded to plaintiffs is eminently fair. While it gives them the difference in value of the property, it does not refund to them the

sum of about $100 which they paid on the purchase contract. The evidence establishes the fact that appellant's failure to perform said contract was without cause. The findings and judgment of the trial court have effected substantial justice between the parties.

The judgment is affirmed.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; SHENK, J.; HOUSER, J.; SEAWELL, J.

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11 Cal.2d 40

HOLLAND v. KODIMER.

L. A. 16435.

Supreme Court of California.

March 24, 1938.

1. Automobiles 🔑200

The statutory liability of the owner of an automobile for the negligent operation thereof by another is direct and several as well as joint and is not dependent upon a judgment against the operator. Civ.Code, § 1714¼.

2. Execution 🔑18

A provision in statute imposing liability on owner of automobile for negligence of operator thereof that, on recovery of judgment by injured party, recourse shall first be had against property of operator who has been served, may be waived by owner, since it is for owner's benefit and applies only where judgment is recovered against operator and owner. Civ.Code, § 1714¼.

3. Indemnity 🔑13(1)

An automobile owner's right to be subrogated to rights of a person injured through negligence of operator of automobile is not limited to cases in which operator is not made a party defendant, but applies to any recovery under the statute, since owner's right of contribution does not rest on existence of judgment against operator in same action. Civ.Code, § 1714¼.

4. Indemnity 🔑15(1)

Under statute giving automobile owner a right of subrogation to rights of parties injured through negligence of operator of automobile, where injured party recovers against owner, owner may bring an independent action against operator, and owner is not limited to proceeding against property of operator on judgment entered in action by injured party against owner and operator. Civ.Code, § 1714¼.

5. Indemnity 🔑15(1)

Where automobile owner and operator thereof are sued jointly by person injured through operator's negligence, owner may demand that jury be directed to pass on issue of operator's liability in order that owner may have recourse against operator's property, or owner may proceed under subrogation provision. Civ.Code, § 1714¼.

6. Automobiles 🔑192(1)
Judgment 🔑112

The operator of an automobile against whom a judgment was entered by default was impliedly negligent and his negligence was imputed to owner with whose permission automobile was being operated.

7. Infants 🔑87

In action against automobile owner and his minor son growing out of the negligent operation of the automobile by the son, owner's failure to request the timely appointment of a guardian ad litem for his minor son waived his right to benefit of statutory restrictions on liability of a nonnegligent owner under which recourse must first be had against the operator. Civ.Code, § 1714¼.

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In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny and H. Parker Wood, Judges.

Action by Robert F. Holland against M. C. Kodimer, wherein judgment was rendered for plaintiff, for damages growing out of the negligent operation of an automobile. From an order denying defendant's motion to set aside and recall execution levied on the judgment, defendant appeals, and plaintiff moves to dismiss the appeal.

Motion to dismiss denied; order appealed from affirmed.

Prior opinion, 68 P.2d 988.

Irwin H. Roth, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

H. A. I. Wolch and Thomas A. Reynolds, both of Los Angeles, for respondent.

WASTE, Chief Justice.

Defendant appeals from an order denying his motion to set aside and recall an execution issued and levied under a judgment entered against him in this action for damages.

Stripped of unnecessary and burdensome detail, the sole issue here presented is whether a judgment in the sum of $2,174.39 for damages growing out of the negligent operation of an automobile may be enforced against the adult owner of said automobile when the operator thereof, and codefendant in the action, disaffirms the judgment and has the same and the execution issued and levied thereon against him set aside because of his minority. The action was brought under former section 1714¼ of the Civil Code, the counterpart of the present section 402 of the Motor Vehicle Code, St.1935, p. 153, which at the time of the accident provided, in part, as follows: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle * * by any person using or operating the same with the permission, express or implied, of such owner provided * * * [amount of recovery limited] * * * and provided that in any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant provided personal service of process can be had upon said operator within this state, and upon recovery of judgment, recourse shall first be had against the property of said operator so served; * * * and provided, further, that in the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner shall be subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."

[1] Though personally served with summons, the owner and operator, who were father and son, defaulted and judgment was entered against each in the amount specified. Thereafter, upon a showing that the son was but 19 years of age, the father was appointed his guardian ad litem and, following disaffirmance on behalf of the minor, the judgment and execution issued thereon, upon motion duly noticed, were set aside and recalled as to said minor. This, the defendant owner now contends is fatal to the enforcement of the judgment against him. His argument proceeds largely on the erroneous assumption, so prevalent in his opening brief, that the judgment entered against an owner and a negligent operator of an automobile is a joint judgment which, prior to its enforcement against the owner must, in effect, be extant against the negligent operator, from whom payment must first be sought. In this, the appellant owner is in error. It is now well settled that "In cases which predicate liability of an owner defendant under this section [1714¼, Civ.Code] when ownership of the automobile and permission to operate the same has been proved, the owner becomes directly liable for damage suffered in an amount limited by the statute, and this liability is direct and several, as well as joint, and is not dependent upon a judgment against the operator." Milburn v. Foster, 8 Cal.App.2d 478, 480, 47 P.2d 1106, 1107; Guberman v. Weiner, 10 Cal.App.2d 401, 404, 51 P.2d 1141; Brush v. Kurstin, 11 Cal.App.2d 258, 262, 53 P.2d 777; Sayles v. Peters, 11 Cal.App.2d 401, 404, 54 P.2d 94; Pascoe v. Payne, 124 Cal.App. 528, 12 P.2d 1091, 1092.

In his reply brief the appellant owner alters his position to the extent of recognizing, as he must, that under the authorities such a judgment is joint and several. He maintains, however, that the respondent should be precluded from satisfying the judgment against him because by failing to have a guardian ad litem appointed for the minor defendant operator the respondent has assertedly deprived him, as the nonnegligent owner, of the benefit of the restrictions on the liability imposed upon him by section 1714¼, supra. A somewhat similar contention was advanced in Pascoe v. Payne, supra, in response to which it was declared: "However, the right to have a guardian ad litem appointed was available to said appellant [owner], as well as to the respondent, and, upon application by said appellant to the trial court, such a guardian, no doubt, would have been appointed. * * * Said appellant should not, therefore, be heard to complain on appeal because a guardian ad litem was not appointed." Moreover, it is stated in respondent's brief herein that he was unaware of the minority of the defendant operator until after the entry of judgment, when proceedings were prosecuted on behalf of the minor to disaffirm and set aside the judgment and the execution issued thereon.

[2-5] In our opinion, the decision in Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 261, 262, 44 P.2d 430, 432 (hearing denied by this court), accurately analyzes and applies section 1714¼, supra, and the reasoning therein appearing satisfactorily answers the arguments of the appellant in the present case. In the cited case the jury brought in a verdict for $5,000 against the defendant owner and rendered no verdict as to the defendant operator. There, as here, it was urged, in effect, that, in the absence of a judgment against the operator, it was improper to enter and enforce a judgment against the owner. After pointing out that the failure to find against the operator was not the equivalent of finding in his favor, in which latter event there would be no negligence to impute, the court declared:

"While the liability imposed by this section of the Code upon the owner of an automobile may be secondary as between such owner and the person operating the car with his permission, it is a primary and direct liability and not a secondary one in so far as the injured party is concerned. It would seem that the main purpose of this section is to make such an owner directly responsible to a person injured through the negligence of an operator driving the car with the owner's permission, although the section also contains provisions calculated to protect the owner from the results of the operator's negligence in so far as this may be done between those parties without interfering with the rights of the injured party. After imposing a direct liability on the owner in favor of the injured person, certain provisions are added. One of these is to the effect that the operator shall be made a defendant when personal service may be made upon him in this state. The fact that the operator need not be made a defendant in all cases strongly indicates that the liability of the owner is primary and is not dependent upon whether or not the operator is made a defendant.

"Coupled with the provision last referred to is a subproviso that, upon the recovery of a judgment, recourse shall first be had against the property of an operator who has been served. This must have been intended for the benefit of the owner and not only can it be waived by him but the same *can only apply where a judgment is recovered both against the operator and the owner.* If the injured party has complied with the terms of the section and has made the operator a defendant in the action and served him, the fact that no judgment is subsequently entered against the operator should not free the owner from the direct liability otherwise imposed by the statute. To give this benefit to the owner in case judgment is entered against both is far from providing that a judgment against the owner alone, without mentioning the operator, is void and may not be enforced. To thus interpret this clause would, at least in part, nullify the subrogation clause which follows.

"The next provision in the section is that in the event recovery is had against such an owner he shall be subrogated to the rights of the injured party and may himself recover from the operator the amount of any judgment which has been recovered against him. This clause is not limited to cases where the operator is not made a party but expressly applies to any recovery under the section. The right of contribution does not rest upon the existence of a judgment against the operator in the same action, but applies in the event a recovery is had against the owner and covers 'any judgment and costs recovered against such owner.' Where an operator is made a party to the action and no judgment is entered against him, this provision still gives the owner a right of subrogation and a right to 'recover from such operator' the amount of any judgment entered against the owner. Under this provision an owner may bring an independent action in the nature of an action for contribution and it may not be said, as argued by the appellant, that the other remedy afforded by this section, that of proceeding against the property of the operator on the judgment entered in the original action, is a complete or exclusive remedy.

"While this section is not as clear as could be desired, we think it imposes a primary and direct liability upon such an owner, with secondary provisions to enable him to protect himself as against the operator of the car. Under these latter provisions the owner would have the right to demand that the jury be directed to pass upon the issue as to the liability of the operator, to the end that he may take advantage of the provision that recourse shall first be had against the property of the operator, or he may proceed under the other clause giving him the right of subrogation.

"Under the authorities above cited, we think the appellant here waived his right under the 'recourse' clause by failing to ask that the jury be sent back to complete its verdict and that he was then limited to his right under the 'subrogation' clause." (Italics added.)

[6, 7] So it is here. In the present case the respondent made both the operator and the owner a party defendant and both were personally served with summons. There was no finding or judgment favorable to the defendant operator. In fact, by his default, the implied findings are against him and his negligence is imputable to the appellant owner, with whose permission he was operating the automobile. As in the Broome Case, supra, where the owner was held to have waived his right of "recourse," but not his right of subrogation against the operator, by failing to demand that the jury also pass upon the liability of the operator, so here, by his failure to request the timely appointment of a guardian ad litem for his minor son and operator of the automobile, as was his privilege, the appellant must be held to have waived his right of "recourse."

The italicized language in the Broome decision, supra, to the effect that the "recourse" provision of section 1714¼ supra, "can only apply where a judgment is recovered both against the operator and the owner," serves to distinguish and dispose of the case of Cook v. Superior Court, 12 Cal.App.2d 608, 612, 55 P.2d 1227, relied on by the appellant owner, for there a judgment had been entered against both the operator and owner, necessitating that "recourse" first be had against the property of the operator.

What has been said sufficiently disposes of the appellant's contentions.

In concluding, we desire to state that we express no opinion upon a factual situation wherein it is charged and proved that a judgment against an owner alone is the result of collusion or fraud between the injured party and the operator. Such issue is not here involved and we refrain from determining the same.

The motion to dismiss, noticed when the cause was pending in the District Court of Appeal of the Second Appellate District, Division 2, is denied, and the order appealed from is affirmed.

We concur: HOUSER, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.; LANGDON, J.

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11 Cal.2d 58

MONTGOMERY v. BULLOCK et al.

L. A. 16531.

Supreme Court of California.

March 25, 1938.

1. Homestead 🔑197

It was proper for trial court to separate portion of realty impressed with homestead from remainder, constituting business property, in action to quiet title thereto.

2. Appeal and error 🔑1099(1)

A holding of District Court of Appeal, on reversing judgment of nonsuit in action against husband and wife to quiet title, that it was proper for plaintiff to ask court to determine what portion of land described in wife's declaration of homestead was needed for her convenient use and what portion was excess land, became law of case.

3. Appeal and error 🔑931(1)

It is assumed on appeal from judgment for plaintiff in action to quiet title that evidence supported trial court's finding that conveyances of portion of realty found to be business property, including transfer from defendant husband to codefendant wife, in whose favor remainder was impressed with homestead, were made without valuable consideration and with intent to defraud husband's creditors, in absence of contrary showing.

4. Fraudulent conveyances 🔑310

A judgment, quieting title to portion of realty found to be business property in creditor of husband conveying all such realty to his wife, who declared homestead in remainder thereof, was properly entered on trial court's findings, supported by evidence, that conveyances thereof, including that of husband, were made without valuable consideration and with intent to defraud his creditors.

5. Fraudulent conveyances ⚷64(2)
Homestead ⚷100

A husband's conveyance of community property to his wife in contemplation of insolvency, with intent to defeat claim of one subsequently suing for and recovering damages against him for assault and battery committed shortly before conveyance, was void as against such claimant, and property remained spouses' community property, but portion used for family home was subject to homestead declared by wife pending such action. Civ.Code, §§ 1238–1265, 3439–3442.

6. Fraudulent conveyances ⚷38

As doctrine invalidating conveyances to hinder, delay, and defraud grantor's creditors is inapplicable to creation of homestead, a homestead declared by wife in portion of community property conveyed to her by husband was not invalid because of pending tort action against latter, but was exempt from execution or forced sale in satisfaction of judgment later obtained by plaintiff. Civ. Code, §§ 1240, 1241.

7. Fraudulent conveyances ⚷52(1)

A gift, sale, or pledge of any part of homestead cannot be with intent to defraud creditors having no lien on premises. Civ. Code, §§ 1238–1265, 3439–3442.

8. Fraudulent conveyances ⚷52(3)

The validity of wife's conveyance of homestead, declared by her in portion of realty conveyed to her by husband before entry of judgment against him in tort action pending at time of such declaration, was not subject to attack by judgment creditor in latter's action against spouses and wife's grantee to quiet title to realty as made in fraud of husband's creditors. Civ. Code, §§ 1238–1265, 3439–3442.

9. Homestead ⚷197

A husband's failure to join his wife in executing and acknowledging her deed of homestead in portion of community property did not defeat grantee's right to judgment quieting her title to homestead property, as prayed in her separate answer to complaint in action by husband's judgment creditor to quiet title, where husband joined with wife in averring in their answer that they claimed no interest in property. Civ.Code, § 1242.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement C. Nye, Judge.

Action by Ida M. Montgomery against William E. Bullock, his wife, Orpah Bullock, Grace A. James, and others to quiet title to realty purchased by plaintiff at execution sale for satisfaction of a judgment against the first named defendant. Judgment for plaintiff, and named defendants appeal.

Plaintiff's motion to dismiss the appeal or affirm the judgment denied, and judgment reversed, with instructions.

W. K. Dial, of Los Angeles, for appellants.

G. M. Grant, of Los Angeles, and B. F. Tyler, of San Diego, for respondent.

WASTE, Chief Justice.

On September 8, 1930, defendant William E. Bullock committed an assault and battery upon this plaintiff, Ida M. Montgomery. In May, 1931, she sued him for damages, and on April 26, 1932, had judgment in the sum of about $2,200. She caused execution to be issued and levied upon certain real estate which William E. Bullock and his wife, Orpah Bullock, had acquired in 1927 as community property, and at execution sale on January 30, 1933, she purchased the property for $1,200. There being no redemption, she received a sheriff's deed thereto on February 15, 1934. On April 4, 1934, she commenced the present action to determine her right to the property and to quiet title. A verified answer to the complaint was filed by the Bullocks, alleging that Orpah Bullock had sold the property to defendant Grace A. James, sister of William E. Bullock. Mrs. James filed a separate answer, alleging her purchase of the property and praying that her title thereto be quieted. On issues so joined the cause went to trial. Thereafter the trial court made findings and gave judgment for plaintiff. The three answering defendants, the Bullocks and Mrs. James, appealed. The cause is now under submission on motion of plaintiff to dismiss the appeal or affirm the judgment, and on the merits. A meager bill of exceptions prints less than a page of the evidence adduced upon the trial, and the appeal is therefore presented virtually as an appeal on the judgment roll.

The real property in question consisted of a city lot in Los Angeles, 61 feet by 147½ feet, upon which had been erected a dwelling with built-in garage, used as the Bullock home, and three separate dwellings and two double garages which the Bullocks rented to tenants. William E. Bullock had no assets, save his interest in the property, and he apparently made every effort to prevent its being taken to apply in satisfaction of plaintiff's claim against him for damages. On September 15, 1930, which was about a week after the altercation in which he injured plaintiff, he deeded the property, without consideration, to his wife, who admittedly knew as well as he that plaintiff had a cause of action against him for tort. On November 21, 1931, while the tort action was pending. Orpah Bullock declared a homestead upon the property, and on April 6, 1932, about three weeks prior to entry of the judgment for damages, she deeded the property to Mrs. James, her sister-in-law. The trial court found that at all times the property had been under the control of William E. Bullock, and that the several transfers thereof were all made without valuable consideration, at his instance in contemplation of insolvency, in an attempt to delay and prevent the sale of the property under execution to satisfy his liability to plaintiff, and in fraud of her rights as an existing creditor, and that at all times up to January 30, 1933 (date of execution sale), the property continued to be community property of the Bullocks. The trial court further found that, although the declaration of homestead contained a description of the property as a whole, the only portion thereof impressed with a homestead was the dwelling house occupied by the Bullocks and the land reasonably necessary for its use, i. e., the immediate land under the house, 20 feet in front to property line, half of 7 feet between the house and house north, and half of 14 feet east of the house; that all the rest of the property, with the houses and garages rented to tenants, was business property, not impressed with the homestead. From the fact that the Bullocks, in their verified answer, claimed no right to the property, alleging its sale to Mrs. James, the trial court concluded that they had disclaimed and waived all right, title, or interest therein; and, from the facts as a whole, the court further concluded that neither the Bullocks nor Mrs. James had any right to or interest in the property, but that plaintiff, by virtue of her sheriff's deed, was the owner in fee simple thereof; hence the judgment for plaintiff.

[1, 2] In this action it was proper for the trial court to separate that portion of the property found to have been impressed with the homestead from the remainder of the estate, found to be business property. See Montgomery v. Bullock, 13 Cal. App.2d 196, 56 P.2d 564, which was a prior appeal in this cause from a judgment of nonsuit. The District Court of Appeal, in reversing the judgment, held that it is proper in a quiet title suit for a plaintiff to ask the court to determine what portion of land described in a declaration of homestead is needed for the convenient use of the claimant and what portion thereof is excess land. That holding has become the law of this case. See, also, Wagner v. Ulrich, 204 Cal. 452, 268 P. 629.

[3, 4] Considering first the status of that portion of the estate found to be business property, it is assumed, in the absence of any showing to the contrary, that the evidence supported the trial court's finding that the conveyances thereof, including the transfer from William E. Bullock to his wife, were all made without valuable consideration and with intent to defraud his creditors. Upon such finding it was proper to enter judgment quieting title to said property in plaintiff.

[5-8] Considering secondly the status of that portion of the estate found to have been impressed with the homestead, we are of the view that the trial court erred in quieting title in plaintiff for the following reasons:

The conveyance of September 15, 1930, by William E. Bullock to his wife, found to have been made in contemplation of insolvency, with intent to defeat plaintiff's claim, was void against plaintiff, sections 3439-3442, Civ.Code, and the property remained the community property of the Bullocks. The portion of said community property which was used for the family home was subject to homestead by the wife, sections 1238–1265, Civ.Code. She declared a homestead prior to the time plaintiff's claim merged into a judgment. As the doctrine bearing upon conveyances made to hinder, delay, and defraud creditors has no application to the creation of a homestead, the homestead here was not invalidated by reason of the pendency of plaintiff's tort action, and it was exempt from execution or forced sale in satisfaction of the judgment for damages later obtained by plaintiff in said action. Schmidt v. Denning, 117 Cal.App. 36, 3 P.2d 322;

Beaton v. Reid, 111 Cal. 484, 44 P. 167; Fitzell v. Leaky, 72 Cal. 477, 14 P. 198; Sullivan v. Hendrickson, 54 Cal. 258; 13 Cal.Jur. pp. 477, 478, § 51; 12 Cal.Jur. p. 962, § 9; Civ.Code, §§ 1240, 1241. Furthermore, it has long been the rule that a gift, sale, or pledge of any part of a homestead cannot, under any circumstances, be with intent to defraud a creditor not having a lien upon the premises, for a creditor is not entitled to complain of the transfer by the debtor of an asset which he could not have reached, had the debtor retained it. Nicholdson v. Nesbitt, 4 Cal.App. 585, 88 P. 725; In re Estate of Fath, 132 Cal. 609, 64 P. 995; Wetherly v. Straus, 93 Cal. 283, 28 P. 1045; 13 Cal.Jur. § 72, pp. 503, 504. Thus the validity of Mrs. Bullock's conveyance of the homestead to Mrs. James was not subject to attack by plaintiff on the ground that it was made in fraud of creditors or otherwise. If the conveyance was invalid, then the property remained impressed with the homestead and was not subject to plaintiff's claim. If the conveyance was valid, then the property in passing to the grantee, retained the exemption which it acquired by reason of the homestead. In either event the matter was no concern of plaintiff, for she could not reach the homestead or the fruits of sale thereof.

[9] The record indicates that the effectiveness of the transfer of the homestead by Mrs. Bullock may be open to question because apparently Mr. Bullock did not join with her in executing and acknowledging the instrument by which she purported to convey it to Mrs. James. Section 1242, Civ.Code; 13 Cal.Jur. §§ 62, 66, p. 491 et seq. However, so far as this cause is concerned, Mr. Bullock was the only party who might have complained of the deficiency, and he joined with Mrs. Bullock in averring, in their verified answer, that they claimed no right, title, or interest in the property; that, when they were unable to meet payments on the encumbrance upon it, it was conveyed by Mrs. Bullock for a valuable consideration to Mrs. James. This pleading constituted a disclaimer by the Bullocks in favor of Mrs. James, their nonadversary codefendant, but not in favor of plaintiff, and, in view of Mrs. James' prayer for affirmative relief, under the circumstances shown it would have been proper for the trial court to have quieted title to the homestead in her as against plaintiff. The validity of the transfer of the homestead, as between the Bullocks and Mrs. James, would not be affected by such adjudication, as no rights between said parties were at issue in this cause. We may add that it appears from the findings that prior to the trial of this action on December 4, 1936, the homestead was conveyed back to Mrs. Bullock.

The motion to dismiss or affirm is denied. The judgment is reversed, with instructions to the trial court to amend its findings and conclusions to conform to the views above expressed, and to enter a proper judgment quieting the title of defendant Grace A. James to that portion of the property impressed with the homestead, and quieting the title of plaintiff to the remainder of the property; each side to bear its own costs on this appeal.

We concur: EDMONDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.

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11 Cal.2d 73

AUSTIN v. LAMBERT, Judge.

S. F. 15931.

Supreme Court of California.

March 28, 1938.

1. Judges 🔑24

The duties of a judge of the superior court include duty to hear and determine causes presented to him unless in a particular cause he is disqualified or unable to act. Pol.Code, § 904.

2. Constitutional law 🔑55

Reasonable regulations may be made by the Legislature in the matter of prescribing disqualifications of judges.

3. Judges 🔑39

Prior to the enactment of the statute providing for disqualification of judge of superior court by peremptory challenge, statutes providing for disqualification for bias, prejudice, or interest were continuation of civil law or common law, and based on principle that disinterest and impartiality are indispensable in proper administration of justice. Code Civ.Proc. § 170.5, as added by St.1937, p. 1496.

4. Constitutional law ⚷55
Judges ⚷40

The statute authorizing a litigant or his attorney to disqualify judge of superior or municipal court by peremptory challenge is unconstitutional as unwarranted interference with constitutional and orderly processes of the court. Code Civ.Proc. § 170.5, as added by St.1937, p. 1496.

5. Constitutional law ⚷205(1)

The statute authorizing a litigant or his attorney in municipal or superior court to disqualify judge by peremptory challenge is not unconstitutional as violating constitutional provision that no citizen or class of citizens shall be granted privileges or immunities which on same terms shall not be granted to all citizens, in that statute grants to defendant or his attorney in criminal case right peremptorily to challenge judge and denies it to counsel for prosecution. Code Civ. Proc. § 170.5, as added by St.1937, p. 1496; Const. art. 1, § 21.

6. Statutes ⚷74(2)

The statute authorizing litigants in municipal and superior courts to disqualify judge by peremptory challenge, without provisions for similar challenge by litigants in justices' courts exercising same powers of jurisdiction as municipal courts, is unconstitutional as violating constitutional provision that all laws of general nature shall have uniform operation. Code Civ.Proc. § 170.5, as added by St.1937, p. 1496; Const. art. 1, § 11.

◆

In Bank.

Proceeding for writ of mandamus by John W. Austin against Robert B. Lambert, as Judge of the Superior Court in and for the County of Kern, to compel the respondent Judge to proceed with the hearing and determination of an action pending before the court.

Writ issued.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., Stanley C. Smallwood, Deputy Dist. Atty., and Cecil Mosbacher, Deputy Dist. Atty., all of Oakland, amici curiæ.

Thomas Scott and W. A. McGinn, both of Bakersfield, for respondent.

Charles H. Forward and James D. Forward, both of San Diego, J. O. Reavis, of Bakersfield, and Stearns, Luce, Forward & Swing, and Fred Kunzel, all of San Diego, amici curiæ, for Hallmark Oil Co.

Gilford G. Rowland, of Sacramento, Claude Minard, of Fresno, Vernon M. Smith, of San Francisco, William A. Monten, of Los Angeles, amici curiæ, for State Bar, etc.

PER CURIAM.

This is a proceeding in mandamus to compel the respondent judge of the superior court to proceed with the hearing and determination of an action pending before said court entitled John W. Austin et al. v. Hallmark Oil Company et al. The cause had been duly assigned to the respondent judge for hearing and determination. Certain issues of law were noticed for hearing on October 1, 1937. Prior to 10 o'clock a. m. on that day counsel for certain defendants in said action served upon counsel for the plaintiffs therein and filed with the clerk of the court a notice that the named defendants "do hereby peremptorily challenge the Honorable Judge Robert B. Lambert according to the provisions of section 170.5 of the Code of Civil Procedure of the State of California," whereupon the respondent judge refused to proceed further and transferred the cause to another department of the court, assigning as his sole reason for declining to go forward with the hearing the filing of the peremptory challenge against him pursuant to the provisions of section 170.5 of the Code of Civil Procedure. The present proceeding followed.

A general demurrer to the petition raises the question of the constitutionality of section 170.5, added to the Code of Civil Procedure in 1937, p. 1496, and providing in part as follows: "Any party or his attorney to any cause or proceeding of any nature pending in a superior or municipal court, except the people or district attorney in a criminal case, may make and file with the clerk of the court in which the action is pending, and serve on the opposite party, a peremptory challenge in writing of the judge assigned to try or hear the cause or pending matter. Thereupon, without any further act or proof, the presiding judge in those counties where there is a presiding judge who assigns causes for hearing or trial, or the chairman of the judicial council in other counties, shall assign some other judge to try the cause or hear the pending matter, and such cause shall be continued on the calendar until the judge so secured or assigned can try the cause or hear the matter. If it is necessary to secure a judge from another county, the chairman of the judicial council shall assign such judge." The remaining portions of the section provide for the time of making and filing the peremptory challenge, which must be before argument on questions of law or before evidence is taken, or before impanelment of a jury, at the trial on the merits. Other matters germane to the subject matter of the section but not pertinent to this inquiry are also provided for.

It is the contention of the petitioner that the foregoing legislative enactment of 1937 is an unwarranted interference with the constitutional powers and duties of the respondent judge and therefore that it is the duty of said judge to disregard the peremptory challenge interposed in pursuance thereof and to hear and determine the cause presented to him.

[1] Under the Constitution of this state a superior judge has certain powers and duties to perform. Upon assuming his office he takes and subscribes to an oath that he will support the State and Federal Constitutions and that he will faithfully discharge the duties of his office as judge of the superior court to the best of his ability. Pol.Code, § 904. One of those duties is to hear and determine causes presented to him unless in a particular cause he is disqualified or unable to act. He may not evade or avoid that duty. In proceedings too numerous to need citation of authority a superior judge has been required to discharge that duty when no good cause appeared to justify a refusal to act.

[2, 3] The judicial department has recognized that reasonable regulations may be made by the legislative branch in the matter of prescribing certain disqualifications of a judge to act. Those regulations were laid down generally in sections 170, 171, and 172 of the Code of Civil Procedure as originally enacted. They provided for disqualification for bias, prejudice, or interest and for the most part were a continuation of the civil law or the common law on the subject, and were based on the eternal verity that disinterest and impartiality are indispensable in the proper administration of justice. In this state, prior to the enactment of section 170.5 in 1937, the question of the existence of bias or prejudice on the part of the trial judge was one of fact to be alleged under oath and to be subject to judicial determination. Nothing is said in the new section about bias, prejudice, interest, or any other recognized ground for disqualification. No showing, ex parte or otherwise, is required and no reason need be given for thus stripping the judge of his judicial functions. No more is required to accomplish that result than the arbitrary and undisclosed reason and purpose of the litigant or his attorney.

No statute has been brought to our attention or discovered by research which has gone to the length of section 170.5 in thus placing the exercise of judicial power, duty and responsibility subject to the whim and caprice of a lawyer or litigant, and no court decision has been cited or obviously could be cited upholding such an arbitrary provision. Nevertheless the petitioner and those in collaboration with him urge that in fifteen other states in the United States there are statutes providing for a so-called "peremptory challenge" of a judge and that those enactments have not been declared unconstitutional. A reading of those statutes discloses that without exception they provide for some showing of disqualification by *affidavit*. True, in many if not in most of them the affidavit, if made as provided by the statute, is effective, and no counter showing is required or permitted. Such an ex parte proceeding has been upheld on the ground that the charge of bias or prejudice under oath is at least an imputation of such disqualification sufficient to save the statute from successful attack on constitutional grounds.

The statutes in the other jurisdictions will be referred to by reference but without quotation. Arizona, Revised Code 1928, § 3721; Florida, Compiled Gen.Laws 1927, § 4341; Indiana, Burns' Stats.Annotated 1933, § 2-1401; Maryland, Bagby's Annotated Code 1924, art. 75, § 111; Minnesota, 1936 Supplement to Mason's Minnesota Stats.1927, § 9221, p. 878; Missouri, Revised Stats.1929, § 907, Mo.St.Ann. § 907, p. 1186; Montana, Revised Codes 1935, § 8868, Code of Civ.Proc.; Nevada Compiled Laws 1929, vol. 4, Supplement 1934, p. 1, § 8407; New Mexico, Laws 1933, c. 184, p. 502; Ohio, Throckmorton's Annotated Code 1934, § 1527; Oregon, 1935 Supplement to Annotated Code, Official Ed. 1930, p. 37, § 1-406; South Dakota, Compiled Laws 1929, § 4455; Washington, Revised Stats., Remington, vol. 2, pp. 170–172, §§ 209—1, 209—2; Wisconsin, Stats.

1931, § 261.08; Wyoming, Revised Stats. 1931, Annotated, § 89-1101.

The language in the foregoing statutes is not in all respects uniform, but without a single exception each enactment requires the filing of an affidavit or other statement under oath in support of a charge of disqualification of the judge. The rule in the United States courts is also asserted to be in harmony with section 170.5. But an examination of the federal statute and the decisions thereunder entirely refutes the claim. Section 21 of the Judicial Code (36 Stats. at Large, 1090, title 28 United States Code Annotated, § 25) provides: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, * * * and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

In applying the federal statute the Supreme Court of the United States has ruled that the trial court has the power and the duty to pass upon the sufficiency of the facts alleged in the affidavit charging disqualification, although it may not question the truth of the facts alleged. In 1912 a United States District Court held that if construed literally to mean that the mere filing of such affidavit was sufficient to disqualify the judge without a hearing or determination of whether the facts stated were true or showed disqualification, section 21 of the Judicial Code would be unconstitutional as depriving the courts of judicial power, vesting the same in the litigants to that extent. Ex parte N. K. Fairbanks Co., D. C., 194 F. 978. However, in 1921 the Supreme Court of the United States settled the question of the scope and effect of the section in the case of Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481. It was there held, first, that upon the filing of an affidavit in conformity with section 21 of the Judicial Code, averring the affiant's belief that the judge before whom the case was to be tried had a personal bias or prejudice against him, and stating facts and reasons substantial in character and which, if true, fairly established a mental attitude of the judge against the affiant which might prevent impartiality of judgment, accompanied by the required certificate of counsel, it became the duty of the judge to retire from the case; and, secondly, that the judge had the right to pass upon the sufficiency of the affidavit, but not upon the truth or falsity of the facts alleged. It was held, in other words, that the judge was clothed with the power and duty to pass upon the legal sufficiency of the affidavit, but in doing so must assume the truth of facts stated therein. The affidavit there under review was held to be sufficient but it was clearly indicated that facts alleged in order to be sufficient must not be based merely on rumor or gossip or adverse rulings, but that the facts and reasons stated must be substantial and formidable, not frivolous or fanciful. A mental bias as to the law was not sufficient. A personal bias or adverse opinion or leaning toward an individual without just cause was essential. It is therefore shown that in the states which have legislated on the subject and in the federal legislation some substantial showing, under oath, must be made before a judge can be held to be disqualified for bias and prejudice.

It is not contended by the respondent or by those appearing in his behalf that disqualification for other causes, such as interest or relationship is not amply provided for apart from section 170.5. But it is earnestly contended that good reasons are often present which should prevent a judge from trying a particular case but that they are either not the proper subject of averment and proof or are not susceptible of proof. Mental incompetence, irascibility, arbitrariness, discourtesy to counsel, litigants, and witnesses, and other temperamental obliquity, are suggested as good cause for removing a judge from the trial of a cause, but are said to be well nigh impossible of proof sufficient to legally disqualify and that therefore the peremptory challenge is the only way of meeting the situation. It is regrettable that such causes seemed sufficiently grave to justify this legislation. That there is occasionally just cause for complaint of judicial conduct on the grounds advanced cannot be denied. The rule in force for so long a time in this state of permitting a judge to pass upon the question of his own disqualification was admittedly unsatisfactory and unjust. The later rule of having the question of his disqualification passed upon by another judge assigned to the task by the chairman of the judicial council, as provided by subdivision 5 of section 170 of the Code of Civil Procedure, as amended by St.1937, p. 376, is claimed to have proved likewise unsatisfactory.

[4] But to put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department. The well-recognized limitations on legislative regulations of such matters in other jurisdictions, both state and federal, were available when section 170.5 was enacted. In none of them is the arbitrary method of administering the remedy adopted in enacting the statute under attack approved or countenanced. It must therefore be held to be an unwarranted and unlawful interference with the constitutional and orderly processes of the courts.

It is urged by amici curiæ in support of the respondent's position that the analogy under our law between the peremptory challenge of a judge and the peremptory challenge of a juror is complete, citing section 600 et seq. of the Code of Civil Procedure, as amended. But the analogy does not exist, at least to the extent contended for. The juror challenge is not lodged against one sworn to try the case but only against one sought to become qualified to try the case. The peremptory challenge of a prospective juror within the limitations of section 601 of the Code of Civil Procedure, as amended by St.1935, p. 936, results in the elimination from the trial without disclosed reasons or for no reason at all of those who might otherwise be sworn to try the case, and the challenges for cause must under sections 602 and 603 be tried by the court. When the prospective jurors are passed both under the peremptory provision of the statute and for cause, they are then sworn to try the case. No one would be so bold as to say that when that state of the proceeding had been reached and passed it would be proper to permit a litigant then to challenge peremptorily and for no reason at all the right of the jury or any juror to sit in his case. The litigant might prefer for many reasons that the case never be tried and go to judgment, but our system of jurisprudence would not permit the adjudication of cases to depend on any such considerations. When a cause is called for trial before a judge sitting without a jury the "court and jury," so to speak, have been sworn and are ready without further formalities to proceed with the trial of the case and should proceed unless for good cause known to the law, and not merely known in the secret recesses of the mind of the litigant, the trial should not go forward.

[5] The District Court of Appeal, Third Appellate District, passed upon the validity of said section 170.5 in the case of Daigh v. Schaffer, Cal.App., 73 P.2d 927, wherein it was sought to enforce the peremptory challenge against a judge of the superior court in and for Merced county. The writ of prohibition was denied and the decision therein became final sixty days after November 16, 1937. After a full treatment of the subject the court, through Mr. Justice Plummer, properly came to the conclusion that section 170.5 was constitutionally ineffective. Reference is hereby made to the many authorities cited in that decision which bear on the question involved. It is not necessary, however, to go to the length of declaring the section in violation of section 21 of article 1 of our Constitution in that it grants to the defendant or his attorney in the criminal case the right peremptorily to challenge the judge and denies it to the counsel for the prosecution. Instances where legislation has accorded to an accused advantages which have been denied to the prosecution are numerous. The presumption of innocence (Pen.Code, § 1096), places upon the prosecution a greater burden of proof than that imposed upon a plaintiff in a civil suit. An automatic appeal is accorded a defendant in a criminal case and not to the prosecution. Pen. Code, § 1239, as amended by St.1935, p. 1868. Prior to 1927, St.1927, p. 1062, the defendant was allowed more peremptory challenges than the people. Pen.Code, § 1070. The defendant in a criminal action is allowed a right to change the place of trial not given to the prosecution. Pen. Code, § 1033. Other instances might be mentioned but enough have been referred to to indicate that the section is not subject to attack based on this ground.

[6] There is substance in the objection to the section that it violates section 11 of article 1 of our Constitution which provides that, "All laws of a general nature shall have a uniform operation." The section provides that litigants in municipal and superior courts shall have the right peremptorily to challenge a judge of said courts, but makes no provision for a similar challenge by litigants in justices courts exercising the same powers and jurisdiction as municipal courts. In a justice's court having jurisdiction of a civil case involving $1,000, no such challenge is allowed, while in a municipal court where the matter involved is also of the value of $1,000 such a challenge is allowed.

It is unnecessary to approve or disapprove the additional ground on which the District Court of Appeal declared the section unconstitutional in the Daigh Case. Enough has been said to show that section 170.5 is ineffective for the purpose for which it was intended, and that it was and is the duty of the respondent judge to proceed with the hearing and determination of the matter pending before the respondent court.

Let the peremptory writ issue as prayed.

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11 Cal.2d 773

KRUG v. SUPERIOR COURT IN AND FOR SAN FRANCISCO COUNTY et al.

S. F. 15947.

Supreme Court of California.

March 28, 1938.

Rehearing Denied April 25, 1938.

Constitutional law 🔑55
Judges 🔑40

The statute authorizing a litigant or his attorney to disqualify judge of superior or municipal court by peremptory challenge is unconstitutional and void. Code Civ.Proc. § 170.5, as added by St.1937, p. 1496.

◆

In Bank.

Original proceeding for writ of prohibition by Jack Krug against the Superior Court in and for the County of San Francisco and the Honorable F. J. Dunne, Judge, to prevent the respondent judge from proceeding as a committing magistrate with preliminary hearing in cause pending before court.

Peremptory writ denied, and alternative writ discharged.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Nat Schmulowitz, and James L. Feely, all of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Edward M. Leonard, Asst. Dist. Atty., both of San Francisco, for respondent.

George R. Andersen, George Olshausen, Harold M. Sawyer, and Gladstein, Grossman & Margolis, all of San Francisco, amici curiæ, for respondent San Francisco Chapter, National Lawyers' Guild.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., Stanley C. Smallwood, Deputy Dist. Atty., and Cecil Mosbacher, Deputy Dist. Atty., all of Oakland, amici curiæ.

William A. Monten, of Los Angeles, Gilford G. Rowland, of Sacramento, Claude Minard, of Fresno, and Vernon M. Smith, of San Francisco, amicus curiæ in support of constitutionality of section 170.5, Code Civ.Proc.

PER CURIAM.

This is an application for a writ of prohibition to prevent the respondent judge, sitting in the juvenile department of the respondent superior court, from proceeding as a committing magistrate with the preliminary hearing in the case of People v. Jack Krug. The sole basis for the application for the writ is that the defendant in said action, the petitioner herein, has made and filed with the clerk of said court and served on the district attorney a peremptory challenge in writing of the respondent judge as provided by section 170.5 of the Code of Civil Procedure, as added by St.1937, p. 1496. The document merely states that the defendant in said action "does hereby in writing peremptorily challenge the Honorable Frank H. Dunne, Judge of the above entitled court, sitting as a committing magistrate and assigned to try or hear the above entitled cause or pending matter, all in pursuance of the provisions of section 170.5 of the Code of Civil Procedure of the State of California".

In the proceeding entitled John W. Austin v. Robert B. Lambert et al., Cal.Sup., 77 P.2d 849, opinion and decision in which were filed this day, it was declared that said section 170.5 was and is invalid and consequently of no force or effect. On the authority of that case the peremptory writ herein is denied and the alternative writ is discharged.

11 Cal.2d 53

MEHOLLIN v. YSUCHIYAMA et al.

L. A. 16496.

Supreme Court of California.
March 25, 1938.

1. Municipal corporations 🔑**857**

In action for death from injuries received in a public market in fall allegedly caused by boxes in aisle adjoining fruit and vegetable stall operated by defendants, instruction that defendants were negligent in failing to keep aisle clear as required by their lease was properly refused, since provision of lease was not germane as between the defendants as lessees and a third party.

2. Master and servant 🔑**332(1)**

In action for death from injuries received in a public market in fall allegedly caused by boxes in aisle adjoining fruit and vegetable stall operated by defendants, whether employee was negligent in failing to take boxes inside stall before continuing to arrange display on stand was for the jury.

3. Negligence 🔑**5**

A failure to use ordinary care cannot be justified by showing that others in the same business practice a similar want of care.

4. Appeal and error 🔑**1066**

An instruction which relates to matters as to which there is no evidence will not justify a reversal, though instruction is erroneous, unless it has misled the jury to the appellant's prejudice.

5. Trial 🔑**296(3)**

In death action against operators of a fruit and vegetable stall in a public market, an instruction incorporating a statement that operators were required to use only the care usually exercised by others in the same business, preceded and followed by a correct statement of the law to the effect that operators were required to use ordinary or due care, was not ground for reversal, although statement incorrectly stated the law and had no application to any facts in evidence.

6. Municipal corporations 🔑**857**

In death action against operators of a fruit and vegetable stall in a public market, conflicts in evidence respecting negligence and contributory negligence were for the jury.

7. Appeal and error 🔑**1002**

Where evidence respecting the issues of negligence and contributory negligence were conflicting, a judgment denying recovery in death action would not be disturbed although the evidence would have authorized a recovery.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter Gates, Judge.

Death action by Roy Mehollin against T. Ysuchiyama and another, an association with the fictitious name of T Y T Produce Company. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinion, 70 P.2d 237.

E. B. Drake, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

SEAWELL, Justice.

Plaintiff prosecutes this appeal from a judgment for defendants entered upon a jury verdict. The action was brought by plaintiff, 43 years of age, to recover damages for the wrongful death of his mother, 63 years of age, upon whom he was dependent for support by reason of his physical infirmities.

The plaintiff's mother received the injuries from which she died in the Grand Central Public Market in the city of Los Angeles. Defendants Ysuchiyama and Tanobe lease a stall in said market in which they sell fruit and vegetables. Decedent had purchased tomatoes at said stall. As she was leaving the stall she fell and sustained injuries consisting of a fractured left humerus (bone of the upper arm), a fracture of two dorsal vertebrae, and a bruise on the head. She died about a month after the accident from a pulmonary embolism, which, it was stipulated, resulted from said injuries. It was the theory of plaintiff that decedent fell by reason of boxes negligently left in the aisle adjoining the stall by an employee of defendants, or because of boards protruding from beneath said boxes. As grounds for reversal plaintiff urges errors in instructions. No claim is made that the floor was wet, or that there was any foreign matter on it, other than said boxes and boards.

The stall of defendants occupies a rectangular space 18½ by 23 feet. Produce is displayed in sloping counters as commonly used in vegetable markets. Sales are made from within the stall, where the produce is kept. There was testimony on behalf of defendants that by reason of the width of the counters it is impossible to arrange the displays from the back of the counters. Boxes of fruit and vegetables to be arranged for display are carried from the stall into the adjoining aisles. The produce is then taken from the boxes and placed in the display counters. The market opens at 8 a. m. Employees of defendants customarily arrive between 7 and 8 a. m., and commence the work of arranging the displays, which is completed about 9 o'clock. The market is brightly lighted at all times.

The accident took place at about 8:30 a. m. Defendants admit that in the aisle adjoining their stall on the east, near the northeast corner of the stall, there were three piles of lug boxes. One pile contained nine boxes, and the other two, three boxes each. These boxes, containing peas, had been taken into the aisle from the stall to arrange the counter for display by employee Kiyoshi. He had finished arranging the peas, leaving the boxes, empty or partially filled, in the aisle, and at the time decedent came to the stall he was arranging a display of cherries. He testified that he had not finished decorating with the peas more than ten minutes before the accident took place. According to his testimony, decedent stood between two of the piles of boxes while he waited on her. He sold her a pound of tomatoes and then turned to continue arranging the cherries. He next saw decedent lying prone on the concrete floor by the boxes.

The only person who saw decedent fall was Mr. Brown, an employee of a meat market which occupied space north of defendants' stall. From the meat market he observed decedent complete her purchase, turn, take "a step or two," and fall. The presence of the boxes barred his view of her feet, and he did not observe what her feet had struck. This witness testified that on the concrete floor beneath one of the piles of boxes were several boards, about three-eighths of an inch thick, being the top boards removed from lug boxes, and that these boards protruded about a foot and a half or two feet from beneath the pile of boxes. He "thought" decedent stumbled on these boards. Tanobe, one of the defendants, and Kiyoshi, the employee who had brought the boxes into the aisle, denied that there were any boards under the boxes or on the floor.

The rules and regulations of the Grand Central Public Market, which were incorporated in the lease to defendants, contained the following: "Lessor will keep the aisles clean but tenants must not throw or place dirt, boxes or garbage or anything else whatsoever in the same."

[1, 2] Plaintiff complains of the refusal of the court to give an instruction to the effect that defendants were without right to place boxes in the aisle, and their failure to keep the aisle clear was negligence. It was not error to refuse said instruction. A violation of the above provision between lessor and lessees would not be germane as between the lessees and a third party on the question of general negligence. Furthermore, it cannot be said as a matter of law that the above-quoted provision would absolutely preclude the placing of boxes in the aisle temporarily for the purpose of arranging displays, in view of the testimony that by reason of the width of the stationary counters it was impossible to decorate them except from the front or aisle side. Whether the defendants' employee was negligent in failing to take the pea boxes inside the stall before proceeding to arrange the cherry display, upon which he had been working ten minutes when the accident took place, was a question for the jury.

The court gave plaintiff's requested instruction to the effect that if the boxes were left in the aisle for the purpose of placing the vegetables upon counters "then it was the duty of said defendants to use ordinary care in rendering the aisle where the deceased was walking or moving in a reasonably safe condition, and a failure, if any, on the part of said defendants in this behalf was negligence."

The court gave instructions on the issue of decedent's contributory negligence, including an instruction that deceased had a right to assume that the aisle "was in a reasonably safe condition, and did not have to make any particular examination to determine the same, and she had a right to indulge this presumption until she knew, or by the use of ordinary care could have known to the contrary."

The court also gave the following instruction: "A storekeeper, and in this case T. Ysuchiyama and Y. Tanobe, must use ordinary care to see that his premises are not made unsafe for the use of customers. He is held, however, only to the use of ordinary care and to the care usually exercised by others in the same business and under the same circumstances, and defendants T. Ysuchiyama and Y. Tanobe are not required to use or exercise the highest degree of care nor are they insurers of the safety of their patrons. Ordinary or due care is all that is required of them in the maintenance of their stall and the aisleways adjoining, and if you find that such due and ordinary care was exercised by them in this regard, then plaintiff may not recover and your verdict should be for the defendants."

[3-5] The reference in the second sentence of the above instruction to the care "usually exercised by others in the same business" is not a correct statement of the law. A person cannot justify his failure to use ordinary care by showing that others in the same business practice a similar want of care. Anstead v. Pacific G. & E. Co., 203 Cal. 634, 265 P. 487; Foster v. Fernandes, 200 Cal. 274, 252 P. 726; Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409. Furthermore, there was no evidence introduced as to the practice and custom of other persons operating vegetable markets. But an instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant. In re Estate of Budan, 156 Cal. 230, 234, 104 P. 442; Lawrence v. Southern P. Co., 189 Cal. 434, 444, 208 P. 966; O'Meara v. Haiden, 204 Cal. 354, 369, 268 P. 334, 60 A.L.R. 1381; 24 Cal.Jur. 830; 10 Cal. Jur., 10 Year Supp., 700–702. In the case herein, we are of the view that plaintiff was not prejudiced by the above statement, which was preceded and followed by a correct statement of the law, and which had no application to any facts in evidence.

[6, 7] Considering the instructions as a whole, we are of the view that the charge to the jury does not contain error which will authorize a reversal. It was for the jury to resolve conflicts in the evidence and to determine the issues of defendants' negligence and plaintiff's contributory negligence. Although said evidence in the light of the instructions given would have sustained a verdict for the plaintiff, it cannot be said as a matter of law that the judgment for defendants is without support in the record. In this situation, as an appellate court, we cannot disturb the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

CANFIELD v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al. (McMILLEN, Intervener). *

BANK OF AMERICA NAT. TRUST & SAV. ASS'N v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.

CATO v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al. (McMILLEN, Intervener).

Civ. S. C. 60, 59, 61.

District Court of Appeal, Second District, Division 1, California.

March 28, 1938.

Hearing Granted by Supreme Court May 26, 1938.

1. Wills 🔑674

A will giving property in trust to pay $100 per month to testator's son, not by way of anticipation, nor to any assignees of son or on any order of son, and to pay more to son in trustee's absolute discretion, which provided that son should have no interest or estate in the property and that trust estate should not be subject to legal process on account of son's debts, created a "spendthrift trust."

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*For subsequent opinion see 87 P.2d 830.

[Ed. Note.—For other definitions of "Spendthrift Trust," see Words & Phrases.]

2. Judgment 🔑564(1)

Where provisions of will impliedly directing accumulation of surplus income in spendthrift trust were incorporated in decree of partial distribution which became final, but will and decree of distribution were fully considered in decision which reversed dismissal of beneficiary's divorced wife's complaint seeking payment of alimony out of trust income and held that trust was valid but that wife was entitled to recovery out of surplus, reviewing court's decision, rather than decree of distribution, was "law of the case" on appeal in divorced wife's action, which had been consolidated with actions brought by other creditors of beneficiary, as respects applicability of statute making surplus liable to creditors' claims unless accumulation be validly directed. Civ.Code, § 724, and § 859, as amended by St.1935, p. 1459.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Trusts 🔑152

There is no fixed rule by which "station in life" of beneficiary of spendthrift trust will be determined, and extent of allowance to beneficiary out of trust income will be governed accordingly; but each case is decided upon its own particular facts and circumstances. Civ.Code, § 859, as amended by St.1935, p. 1459.

4. Trusts 🔑152

Where testamentary spendthrift trust provided for payment of fixed sum to beneficiary, and of more in trustee's absolute discretion, court's order in suits by beneficiary's creditors to reach surplus income of trust, based on evidence of beneficiary's friends and acquaintances, fixing maximum amount which trustee should pay beneficiary on basis of beneficiary's "station in life," was void as improperly interfering with trustee's discretion. Civ.Code, § 859, as amended by St.1935, p. 1459.

5. Trusts 🔑152

Where testamentary spendthrift trust required trustee to pay beneficiary a fixed sum, and authorized trustee to pay more out of trust income to beneficiary in trustee's absolute discretion, beneficiary's creditors could nevertheless maintain creditors' bills to enforce lien against surplus of trust income over amount paid to beneficiary, as against contention that there was no res to which lien could attach because trust was strictly discretionary. Civ.Code, § 724, and § 859, as amended by St.1935, p. 1459.

6. Judgment 🔑572(3)

A decision of appellate court reversing judgment of dismissal after order sustaining demurrers without leave to amend was res judicata only on question whether complaint stated cause of action.

7. Trusts 🔑152

Where testamentary spendthrift trust gave trustee absolute discretion respecting amount of payment to beneficiary out of income, beneficiary's creditors suing to reach surplus of trust income were entitled to lien on such surplus in the order of and as of date of filing of their respective equitable actions, rather than as of date of judgment in such actions. Civ.Code, § 859, as amended by St.1935, p. 1459.

8. Trusts 🔑152

Where testamentary spendthrift trust required trustee to pay beneficiary fixed amount monthly, and authorized trustee to pay more in trustee's absolute discretion, trustee did not become personally liable to creditors by continuing to pay beneficiary total net income from trust after beneficiary's creditors had obtained equitable liens against trust assets by instituting suits to reach surplus trust income. Civ.Code, § 859, as amended by St.1935, p. 1459.

9. Trusts 🔑152

Where, at time of judgments in creditors' suits to reach surplus trust income accumulating in testamentary spendthrift trust, trustee had spent all income theretofore received with approval of probate court, trial court could make order fixing creditors' equitable liens only with respect to surplus income received by trustee in excess of amounts spent by trustee pursuant to trust on and after date of each judgment. Civ. Code, § 859, as amended by St.1935, p. 1459.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Three actions in equity in the nature of creditors' bills, by Pearl S. Canfield, by the Bank of America National Trust &

Savings Association, and by Pauline C. Cato, against the Security First National Bank of Los Angeles and another, in the first and last of which Laura Elaine Canfield McMillen intervened, and in the second of which Laura Elaine Canfield McMillen was made a party defendant. The actions were consolidated for trial and a single judgment was rendered, from which plaintiffs appeal separately.

Modified and, as modified, affirmed.

J. M. Danziger, Charles A. Buckley, and Goodman, Bachrack & Brownstone, all of Los Angeles (Herman A. Bachrack, of Los Angeles, and R. M. J. Armstrong, of San Francisco, of counsel), for appellant Pearl S. Canfield.

Edmund Nelson, William C. Day, Theodore Weisman, Arthur T. Stollmack, Ralph E. Lewis, and Freston & Files, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant Bank of America.

Theodore Weisman and Arthur T. Stollmack, both of Los Angeles, for appellant Pauline C. Cato.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for respondent Security First Nat. Bank.

Lloyd Nix, of Los Angeles, for respondent Charles O. Canfield.

YORK, Presiding Justice.

These are three actions in equity in the nature of creditors' bills brought by judgment creditors of Charles O. Canfield against him as beneficiary of a trust created by the will of his father, Charles A. Canfield, deceased, and against the Security First National Bank of Los Angeles, as trustee of said trust, in an effort to reach the beneficial interest of said Charles O. Canfield, who is hereinafter referred to as beneficiary.

Appellant Pearl S. Canfield, the former wife of said beneficiary, on September 29, 1931, filed her equitable action (S. C. 60) which was based upon a stipulated decree of divorce awarding her $20,000, plus a monthly sum of $1,000 (later reduced to $800 per month) for her support until her remarriage or until the death of the beneficiary. Demurrers to her complaint were sustained without leave to amend, judgment of dismissal followed, whereupon she prosecuted an appeal therefrom. Upon said appeal the judgment of dismissal based upon the order of the court sustaining the demurrers was reversed, the court holding that appellant was entitled to reach the surplus income payable to the beneficiary from the trust over and above such portion thereof as was needed for the maintenance of beneficiary measured by the so-called "station in life" rule. Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133.

It will be noted that in said opinion the court did not add its approval to a holding that in California we recognize any such thing as "station in life." The court in that opinion uses quotations when it refers to the term "station in life," which is evidently something that has been built up by judicial decision in the several states, although as a general rule our California courts have been careful not to recognize any such thing. They have, however, made reference to "the mode of life" to which the beneficiary and his family have been accustomed, the manner in which he has been brought up, and the habits acquired by him. Magner v. Crooks, 139 Cal. 640, 643, 73 P. 585.

Upon filing of the remittitur, respondents answered, and on February 20, 1936, the cause came to trial on its merits and was consolidated with the Cato case (S.C. 61) and the Bank of America case (S.C. 59) which were filed respectively on September 13, 1935, and September 19, 1935. A single judgment embracing all three actions was rendered from which the three plaintiffs have separately appealed. Appellant Pearl S. Canfield at the time she filed her action on September 29, 1931, prayed for the sum of $23,883.34 plus interest, together with the further sum of $1,000 per month beginning on September 15, 1931, and continuing during the life of the beneficiary and until the remarriage of said appellant; the judgment herein awards her the sum of $79,958.66. Appellants Bank of America and Cato's claims are represented by judgments in the amounts of $46,611.41 and $10,463.46, respectively, which sums with interest are awarded to them by the judgment herein.

The trial court found that appellants' claims should be paid from the income of the trust and decreed that appellants have equitable liens thereon, but that such liens were in no way retroactive regardless of the date of commencement of the respective actions, and established a priority as between the three claimants, ranking appellant Canfield first, appellant Cato second, and Bank of America third. The court also found that the beneficiary required the sum of $30,000 per year for his maintenance in his "station of life"; that the said $30,000 should be exempt from appellants' claims; and that such claims could be satisfied only from any surplus income from the trust in excess of that sum.

The questions here presented are briefly the following: (1) Whether, as a matter of law and evidence, the trial court was justified in finding and holding that $30,000 per year was necessary for the maintenance of the beneficiary according to his "station in life"; (2) whether the equitable liens adjudged by the court should have priority as between themselves, and whether such liens attached only by virtue of the present judgment or at a much earlier date; (3) if the liens attached at an earlier date, whether the trustee is liable to appellants for having paid the income from the trust to the beneficiary while an appeal was pending in the Canfield case.

The will of Charles A. Canfield, deceased, creating the trust, was executed in 1912 and the decree of distribution was entered on March 30, 1914. Said will which disposed of an estate valued at several million dollars contained a provision by which the testator bequeathed the sum of $1,000,000 less $100,000, either in cash or securities, to the Security Trust & Savings Bank for the benefit of the son Charles O. Canfield and his children. In the fifteenth clause of said will testator recited his reasons for creating the trust on behalf of his son and directed that:

The trustee "shall, during the lifetime of my said son, Charles O. Canfield, collect, recover and receive the rents, issues, dividends, profits and income of said share of my estate, investing and re-investing the principal thereof, * * * and after paying all taxes and lawful charges and expenses of the trust * * * to use, apply and pay over the net income remaining, as follows:

"(a) Out of said income to pay, in monthly installments, twelve hundred dollars ($1,200.00) per annum only to and into the proper hands of my son Charles O. Canfield, and not by way of anticipation, nor to any assignees of my said son, nor to or upon any order which my said son shall give, whether such assignment or order be the voluntary contractual act of my son or be made pursuant to or by virtue of any legal process in attachment, execution, bankruptcy, or otherwise.

"(b) Out of said net income, in addition to said annual income of twelve hundred dollars ($1,200.00), to pay and apply, as my said trustee shall deem advisable in the judgment of its president or general manager for the time being, and through such agencies as it may select, and from time to time, whatever sums my said trustee may deem proper for the support, maintenance and education of my grandchildren Orville (since deceased) and Laura Elaine Canfield (now McMillen) children of my said son (by a former marriage), in a manner suitable to their station in life, during their respective lives. * * *

"(c) If, in the judgment of my said trustee, to be exercised by its president or general manager for the time being, my said son shall hereafter prove himself worthy of being entrusted with the expenditure of a larger annual income or allowance than that above given him, my said trustee may, in such event, at any time, and in such proportions and at such time as to payments it shall deem advisable in the discretion of said officers, increase the said allowance and pay over such increase to my said son up to the full limit of the net income of the said trust estate and any unexpended income which may have accumulated in the hands of the trustee, notwithstanding the provision above made as to payments out of the income for the maintenance and education of my said grandchildren. * * *

"(d) It is my purpose and will, by the foregoing provisions as to the application of the income of said trust estate, to commit to my said trustee absolute discretion as to, and full power of control over, the application of all of the net income of said trust estate beyond the said sum of twelve hundred dollars ($1,200.00) per annum.

"It is my will and I do expressly declare that in the principal of the trust mentioned in this item of this my will my said son Charles O. Canfield shall have no interest or estate whatsoever, and that he shall have no interest or ownership in the income thereof other or further than, or different from the interest given him in and by this item. I do further expressly declare and provide that no interest of whatsoever nature given my said son shall be subject to, or subject to be taken for the payment of, any debts whatsoever contracted by my said son, either before or after my death and for any purpose whatsoever, and that my said son shall have no power or capacity to make any disposition whatsoever of any of said income by his assignment or by his order, voluntary or involuntary, and whether made upon the order or direction of any court or courts, whether of bankruptcy or otherwise; nor shall said interest be subject to any process of attachment issued against my said son, or to be taken in execution under any form of legal process directed against him or against the trustee, or the trust estate, the income thereof, or any part of said income. But the whole of the income of the trust estate mentioned in this item shall go and be applied by my said trustee solely for the benefit of my said son and of his said two children * * * free, clear and discharged of and from any and all obligations of my said son whatsoever. Upon and after the death of my said son these trusts shall continue for the benefit of my said two grandchildren * * * for and during the term of their respective lives."

It is then provided that upon the death of either grandchild, one-half of the corpus of the trust estate shall be divided among the children of such deceased grandchild, or in the absence of such issue shall go to the surviving grandchild. In the event that both grandchildren die without issue them surviving, then the corpus of the trust estate shall be divided among testator's surviving daughters and the then living issue of any of such daughters, who might have predeceased said grandchildren.

[1] These provisions of the will create a spendthrift trust and provide that the whole income from the trust shall be devoted to the beneficiary and his daughter (respondent intervener), but they do not provide that any of the income shall ever go to any remainderman. The testator left to the discretion of the trustee the amount of income that should be paid to the beneficiary in excess of the $1,200. The record shows that the trustee paid to the daughter a small sum annually and paid to the beneficiary for many years the remaining total net income from the trust, continuing to do so after the complaints herein were filed. It is also shown that the beneficiary received from the trust an income ranging from $50,000 to $101,000 per annum for the ten-year period of 1920 to 1930; and that he received a total of $150,304.77 from September 29, 1931, to February 29, 1936. All of said payments were made under the absolute discretionary power of said trustee.

Appellants make their claim to the surplus income, if any, of the trust under the terms of section 859 of the Civil Code, as amended by St.1935, p. 1459, which provides: "Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be found necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which can not be reached by execution."

[2] Respondents claim that section 859, supra, is operative only in the absence of a valid direction for accumulation of income and is therefore inapplicable here because the terms of the trust clearly contemplate an accumulation of surplus income and impliedly direct such accumulation, and that even though such direction was originally invalid in violation of section 724 of the Civil Code, its incorporation into a decree of partial distribution which has become final renders it valid as to all persons bound by that decree. In support of their claim, respondents maintain that this conflict between the decree of distribution and section 859 of the Civil Code was not before the court when it rendered its decision in Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133. This is not correct, as the will creating the trust was before that court as was also the decree of distribution by reference, which employed the identical language of the will. The opinion freely discusses the trust and its terms and, in upholding its validity as a spendthrift trust, sections 867 and 859 of the Civil Code are considered, as well as the fact that the corpus of the trust was originally made up of personal property, although it now includes real property in addition thereto. In that regard the opinion considers and discusses at length the applicability of the New York rule from the statutes of which state section 859 of the Civil Code is taken. Having considered in detail these various facts and circumstances, as well as other questions raised by the appeal from the judgment of dismissal, the appellate court held that Pearl S. Canfield was entitled to reach such surplus income from the trust which

was in excess of the portion thereof needed for the maintenance of the beneficiary "measured by the 'station in life' rule"; said court holding by implication that there was no valid direction for accumulation stated in the terms of the trust. Respondents discuss questions of law which are not involved in the questions properly raised by this appeal in an apparent endeavor to convince this court that the decision rendered on the appeal from the judgment of dismissal (Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133) is unsound in its reasoning in all particulars. The only questions before that court were these, and these only: Was it error for the trial court to sustain the demurrers without leave to amend and thereafter enter its order dismissing said cause, and was the order sustaining the demurrers without leave to amend an erroneous order? In so far as these questions are involved and considered, said decision fixes the law of the case, which case is one of the causes before this court at this time.

In connection with their first point, appellants contend that the trial court disregarded the standards established by authority and reason for the determination of "station in life" of the beneficiary; that the allowance of $30,000 per year is unjustified and contrary to the law and the evidence; and that the court erred when it fixed such "station in life" as of the time of the commencement of the Canfield case rather than as of the date of the creation of the trust.

[3,4] The courts have never in any case cited by any of the parties hereto attempted to establish a standard by which "station in life" might be measured, but have decided each case upon its own particular facts and circumstances. This so-called "station in life" rule has been built up by judicial decision rather than by statutory enactment. There is no such thing as "station in life" in existence in this state. No such provision is referred to in the trust created by the will of the testator with reference to the amounts to be paid to the beneficiary. The testator left to his only son by said trust the sum of $100 per month under any and all circumstances, but left it to the sole and exclusive discretion of the trustee, to be carried out in accordance with the expressed provisions recited in the trust, as to how much more, if anything, should be paid to his said son. This is a discretion that the court is not allowed to interfere with, and since there is no provision in the trust providing for approval by the court or by anyone else other than such trustee, any order of the trial court attempting to interfere with such discretion and to substitute its discretion for that of the trustee chosen by the testator is void. The court by the fiction of fixing a so-called "station in life" cannot rewrite the trust created by the will of the testator. In the many cases cited in the authorities wherein the so-called "station in life" rule has been set up, there is nothing recited in the facts which would show that a similar trust was there involved which left the amounts to be paid in excess of a certain amount to the sole and absolute discretion of the trustee.

The trial court by receiving evidence of friends and acquaintances of the beneficiary cannot build up any rule by which it can take from the trustee the discretion vested in it by the trustor. It necessarily follows that the order of the trial court fixing the amount which the trustee shall pay to the beneficiary, based upon anything other than the trustee's own estimate thereof, is void. This is especially true when the trial court sets up a fixed amount as the proper sum to be paid in the coming years, as well as in the year in which the evidence was taken. The court could not tell with any degree of certainty what amount would be necessary for the support of the beneficiary in the years to come.

The main difference between the cases at bar and the facts stated in the cases cited in the decision of the appellate court in Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133, is this: The trust here shows upon its face a definite intent on the part of trustor to create a trust which would prevent his son from running up large debts, and which would not in any way encourage designing persons to extend excessive credit to the son for unnecessary things and in that way absorb possibly all of the income from the trust estate. The trustor's purpose has been achieved in that the trustee has the discretionary right to fix the amount of the income from the trust to be paid to the beneficiary in excess of the sum of $100 per month. If, however, in the exercise of this discretion to expend the income there is any surplus over and above the sum which the trustee may decide is necessary for the maintenance and support of the beneficiary, such surplus income, if any, is liable to the claims of creditors of the beneficiary under the provisions of section 859 of the Civil Code, as amended, and therefore the decision in Canfield v. Security First National Bank, supra, that it was error to sustain the demurrers without leave to amend the complaint, is absolutely correct and was the only question that was before that court.

In Hamilton v. Drogo, 1926, 241 N.Y. 401, 150 N.E. 496, 497, in an opinion concurred in by all of the justices, including Mr. Justice Cardozo, now of the United States Supreme Court, the following appears: "In the present case no income may ever become due to the judgment debtor. We may not interfere with the discretion which the testatrix has vested in the trustee any more than her son may do so. Its judgment is final." However, at the time the decision in the cited case was rendered, section 684 of the New York Practice Act provided that a judgment creditor could reach 10 per cent. of the income from trust funds which were due and owing to the beneficiary over and above a certain fixed amount. We do not have a similar section in California, but this does not change the applicability of that portion of the opinion above quoted.

With respect to the second question presented by appellants, they maintain that the court erred in awarding them equitable liens on the surplus assets of the trust estate as of the date of the instant judgment, contending that such liens should have been allowed as of the date of the filing of their complaints herein. In this connection appellants Cato and Bank of America insist that all three liens should be deemed effective from the time that appellant Pearl S. Canfield filed her complaint on September 29, 1931, while the latter points out that by the filing of her "bill in equity," she acquired an equitable lien on such surplus assets as well as a priority over any other creditor who had not already filed such bill.

[5, 6] Respondents' position in this regard is that a "creditor's bill," although it ordinarily creates an equitable lien upon the debtor's property, cannot extend to property or an interest in property which is not owned by or vested in the debtor at the time of service of process and does not reach interests later coming into existence; that an existing and enforceable right in the debtor being of the essence of a res to which the equitable lien of a creditor's bill can attach, there could be no such lien in the present instance because the trust is strictly discretionary. We believe this is answered by the decision in Canfield v. Security First National Bank, 8 Cal.App.2d 277, 287, 48 P.2d 133, which holds that the beneficiary has an equitable interest in the trust estate and that pursuant to section 859 of the Civil Code, judgment creditors may reach the surplus income over and above the amount required for maintenance of beneficiary according to the "station in life" rule. Said decision also points out that because the trust is a discretionary trust, it does not deny to creditors the right to maintain an action to subject surplus income, if any, to their claims. Such decision is only a decision passing on the judgment that was entered because of the order sustaining the demurrers without leave to amend, and is res judicata only as to the question of whether the complaint stated a cause of action.

[7] To return to appellants' second contention, it is apparent that the court did err in awarding equitable liens as of the date of the judgment herein rather than as of the date of the filing of the respective equitable actions. Appellants' contention is sustained by the decision in the case of Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544, in which a creditor having obtained a judgment on which execution issued and was returned unsatisfied, sought to reach the assets of a testamentary trust which vested in the trustee discretion as to payment of income to the beneficiary. At the trial a motion to bring in other judgment creditors was denied. Upon appeal it was held that, 121 Cal. 438, at page 441, 53 P. 946, 947: "A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit."

In the more recent New York case of Spellman v. Sullivian, D.C.1930, 43 F.2d 762 at page 763, which was based on a statute almost identical in its language to that of section 859 of our Civil Code, it was held: "By the commencement of his suit in equity, the judgment creditor acquires a lien upon the surplus income superior to the claims of general creditors of the beneficiary. Tolles v. Wood, 99 N.Y. 616, 1 N.E. 251. * * * A creditor's bill is a suit to enforce an equitable 'claim' to property. From the moment that execution has been returned unsatisfied, the judgment creditor has a claim to the equitable assets of the judgment debtor. His claim is not merely one in personam against the debtor; he had that claim before judgment. He has a claim quasi in rem against surplus trust income and any other property not subject to execution at law, which claim he may assert and enforce by creditor's bill."

In Jenkins Petroleum Process Co. v. Credit Alliance Corp., 1936, 10 Cir., 83 F. 2d 532, 537, it was held: "One creditor may prosecute a creditor's suit solely in his own behalf, and he acquires a lien as of the date of the filing of his bill superior to all liens subsequently acquired. [Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544; Spellman v. Sullivian (D.C.) 43 F.2d 762, 764; Freedman's Savings & Trust Co. v. Earle, 110 U.S. 710, 716, 4 S.Ct. 226, 28 L.Ed. 301.] * * * In Freedman's Savings & Trust Co. v. Earle, supra, the court said: 'It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. "The creditor," says Chancellor Walworth, in Edmeston v. Lyde, 1 Paige (N.Y.) 637, 640, 19 Am.Dec. 454, "whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance." * * * As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date. As was said by this court in Day v. Washburn, 24 How. 352, 16 L.Ed. 712: "It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a court of chancery will enforce."'"

The trial court by its judgment of May 13, 1936, improperly limited to $30,000 the amount necessary for the support and maintenance of the beneficiary, without considering the fact that the amount to be paid rested in the sole and exclusive discretion of the trustee. By reason of the fact that theretofore all of the income from said trust had been fully expended by the trustee, or the trial court had at least so found, and such expenditures approved by the probate court, said trial court held that it was limited in making its order fixing the equitable liens of the appellants in these three cases to such surplus income received by trustee on account of the corpus of the trust estate on and after May 13, 1936, in excess of $30,000 per annum.

Pearl S. Canfield acquired an equitable lien as of September 29, 1931, the date when her action herein was filed, in the sum of $23,883.34, with interest, upon the surplus, if any, after the amounts fixed by the trustee in its discretion have been fully paid. In addition, said Pearl S. Canfield is entitled to an equitable lien upon the balance of such surplus income, if any, as of June 10, 1932, for the sum which accrued to her at the rate of $800 per month, with interest, during the period from September 29, 1931, to said June 10, 1932, on which latter date she filed her second action, the companion case herein No. S. C. 48. 77 P.2d 866.

Appellant Pauline C. Cato acquired an equitable lien upon such surplus (if any surplus there is after the said two liens of appellant Pearl S. Canfield have been fully paid) as of September 13, 1935, for the sum of $10,463.46 with interest, and appellant Bank of America acquired an equitable lien upon the balance of such surplus (if any remains after the aforesaid three liens are fully paid) as of September 19, 1935, for the sum of $46,611.41, with interest thereon. All of the above creditors' claims are allowed pursuant to the terms of section 859 of the Civil Code, as amended, and therefore attach in the order and as of the date upon which each action in equity was filed.

[8] Appellants next contend that the trustee became personally liable to them when it continued to pay income to the beneficiary after their equitable liens attached to the assets of the trust estate. It must be conceded that trustee, exercising its discretion under the terms of the trust, properly paid to beneficiary the total net income from said trust, and as result no surplus remained from which the equitable liens of appellants could have been paid.

In support of their contention, appellants cite the case of Tolles v. Wood, 99 N.Y. 616, 1 N.E. 251. In that case it was held that an accumulated surplus in the hands of trustees at the time of the judgment which had accrued during the pendency of the action was applicable to the payment of and sufficient to discharge the creditor's judgment. Apparently, the liability of the trustee was predicated upon the fact that this surplus was inalienable to the beneficiary and was not needed for his support. We believe the cited case is not in point, because in the cases before us no surplus accumulated at any time. Appellants also cite section 155 of the Restatement of the Law of Trusts at page 383, as authority for their stand on this point. So far as the restatement is concerned, it is effective only in so far as the cases therein cited may be of assistance; as none is given as authority for the cited section, no legal significance attaches thereto.

Under the circumstances here shown, the trustee did not become personally liable to appellants.

[9] The judgment is affirmed, except that portion thereof which fixes the equitable liens of appellants as of the date of said judgment; and except that portion of said judgment which limits the amount that the trustee may pay to the beneficiary. All of the income theretofore received by trustee from the corpus of the trust had been expended by it and such expenditures approved by the probate court; therefore, the trial court was limited in making its order fixing the equitable liens of appellants in these three cases to such surplus income received by said trustee in excess of the amounts expended by the trustee under the provisions of the trust on and after the date of each of said judgments. Said judgment is modified as follows: Appellant Pearl S. Canfield acquired an equitable lien as of September 29, 1931, in the sum of $23,883.34, with interest, upon such surplus income from the trust estate, if any; in addition said Pearl S. Canfield is entitled to an equitable lien on any additional surplus income of said trust, if any, as of June 10, 1932, for the sum which accrued to her from September 29, 1931, to June 10, 1932, the date upon which she filed her second action, the companion case herein No. S. C. 48, at the rate of $800 per month, with interest; appellant Pauline C. Cato acquired an equitable lien upon the balance of such surplus (if any remains over and above the two said liens of appellant Pearl S. Canfield), as of September 13, 1935, for the sum of $10,463.46, with interest; appellant Bank of America acquired an equitable lien upon the balance of such surplus (if any remains after the aforesaid three liens have been fully paid), as of September 19, 1935, for the sum of $46,611.41, with interest thereon.

The trial court is hereby directed to enter judgment in conformity with these modifications, and as so modified, the judgment is affirmed.

I concur: DORAN, J.

WHITE, Justice (concurring).

I concur in the foregoing in its entirety, and for all of the reasons therein stated. In most of the states of the Union, including California, the right to create a spendthrift trust, within certain limitations, has been authorized by legislative enactment and upheld by judicial decision, manifestly upon the theory that a donor has the right to give his property to another upon any conditions he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050. In the instant case, as in most if not all cases of spendthrift trusts, the father knew the infirmities of his son, and in the creation of this trust manifested parental affection as well as sound judgment. If the right of the trustor to confer discretion, either plenary or partial, upon the trustees could be interfered with through courts substituting their judgment for that of such trustees, the very objects of the spendthrift trust could be defeated by designing creditors or by collusion between such creditors and the beneficiary. From a practical standpoint, as well as for reasons of sound public policy, such trusts are not only legal, but extremely wholesome. They serve to permit a testator in many cases to so provide for a wife, son, or daughter, when in the absence of such trust and the protective elements thereof, the beneficiary might become a public charge. If a decision arrived at by a trustee invested with absolute discretion as in the instant case, may be modified or changed by a court according to the latter's conception of the beneficiary's "station in life," then no trustee, however broad might be the discretion conferred upon him, could act without recourse to and application for the court's conception of the particular beneficiary's "station in life." By the adoption of section 859 of the Civil Code, as amended, the Legislature has legalized trusts of the kind with which we are here concerned, and courts are without authority, under the guise of judicial interpretation, to nullify the legislative authorization of such trusts.

CANFIELD v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al. *

Civ. S. C. 48.

District Court of Appeal, Second District, Division 1, California.

March 28, 1938.

Hearing Granted by Supreme Court May 26, 1938.

Trusts 🔑152

The divorced wife of beneficiary of testamentary spendthrift trust could maintain suit to recover surplus trust income remaining after trustee's payment, pursuant to discretion vested in trustee by will, of trust income to beneficiary.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Pearl S. Canfield against the Security First National Bank of Los Angeles and others, to recover sums due under property settlement incorporated in divorce decree. From an order dismissing the action, plaintiff appeals.

Reversed and remanded, with directions.

J. M. Danziger, Charles A. Buckley, and Goodman, Bachrack & Brownstone, all of Los Angeles (Herman A. Bachrack, of Los Angeles, of counsel), for appellant.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for respondent Bank.

Lloyd Nix, of Los Angeles, for respondent Canfield.

YORK, Presiding Justice.

Having obtained leave of the court in supplementary proceedings, plaintiff filed the instant action on June 10, 1932, to recover the sum of $23,933.34 due her under the terms of a property settlement agreement incorporated in the interlocutory decree of divorce between herself and defendant Charles O. Canfield. In addition to the sum of $23,933.34 and interest, which she alleges had accrued on October 10, 1931, she also prays for such further sums as became due under said agreement subsequent to October 10, 1931, plus interest. The court sustained a general demurrer to the complaint herein without leave to amend, and thereafter entered an order dismissing said action.

The instant action was filed after the entry of a judgment of dismissal upon the sustaining of demurrers without leave to amend in appellant's original suit against the same parties, No. S. C. 60. While an appeal was pending in said action No. S. C. 60, this suit was filed by appellant "to cure purely technical objections to the complaint in said first cause (No. S. C. 60) raised by respondents." She also states that it was also filed "incidentally for the purpose of setting up additional sums which accrued to plaintiff under her decree of divorce from and after the filing of her complaint in the first case * * * to and including the date of the filing of her complaint in the case at bar."

For the reasons stated in the decision this day filed in the consolidated cases of Canfield, Cato and Bank of America v. Security First National Bank, 77 P.2d 857, the judgment of dismissal herein is reversed and the cause remanded to the trial court, with directions to allow an amended complaint to be filed setting up the additional sums, other than the sums prayed for in action No. S. C. 60, accruing up to and including the date of the filing of the complaint herein.

We concur: DORAN, J.; WHITE, J.

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*For subsequent opinion see 87 P.2d 847.

25 Cal.App.2d 467

BINGHAM v. GREENAMYER.

Civ. 5956.

District Court of Appeal, Third District, California.

March 23, 1938.

Hearing Denied by Supreme Court May 19, 1938.

1. Automobiles ⚷171(13)

A motorist must keep a sharp lookout for others who may be using the highway and must anticipate the presence of others who may lawfully be thereon, but is not required to anticipate that an approaching automobile will unlawfully turn to the left in front of him without warning. St.1935, p. 185, § 544.

2. Automobiles ⚷171(9)

A statutory requirement that a motorist contemplating making a left turn shall extend his arm horizontally before attempting to make the turn is not complied with by an extension and immediate withdrawal, since requirement is to enable approaching drivers to see the signal and take precautions to avoid collision. St.1935, p. 185, § 544.

3. Automobiles ⚷244(35)

Evidence indicating that visibility was good up to 200 feet, and indicating that motorist stopped within 95 or 110 feet on wet pavement after colliding with approaching truck which turned to the left in front of motorist without warning, precluded recovery on basis of excessive speed, for injuries sustained by workman who was riding on back of truck. St.1935, pp. 176, 185, 222, §§ 510, 511, 544, 670.

◆

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Carl Bingham against Charles E. Greenamyer, Jr., to recover damages for injuries sustained in an automobile collision. Judgment for plaintiff, and defendant appeals.

Reversed.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for appellant.

Frank C. Hale and Edward Bickmore, both of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant, awarding him damages for and on account of an injury sustained in an automobile collision on or about the 4th day of February, 1936. From this judgment the defendant appeals.

The facts as found by the court are to the effect that on the 4th day of February, 1936, at about the hour of 7 a. m., at a point on the California State Highway No. 140, in the county of Merced, the defendant, Charles E. Greenamyer, Jr., was proceeding in a Ford car in a westerly direction at a speed of 30 to 40 miles per hour (the testimony of the defendant was to the effect that he was driving at about 35 miles per hour) upon his right side of the road; that at said time and place his headlights were lit and the car was in a good mechanical condition. It was a foggy morning, but ordinary objects could be seen on the road for a distance of about 150 feet. Objects which had lights upon them could be seen at a greater distance. The pavement was white concrete, and was wet from the effects of the fog. That at a point about eight miles west of the city of Merced an employee of the California Packing Corporation named Gilbert Pitts was driving a truck owned by said corporation, in an easterly direction. Upon the truck eighteen employees were being transported from one ranch to another belonging to the corporation. One of said employees was the plaintiff in this action. The employees were riding up on the bed of the truck with their legs hanging over the sides thereof. There appears to have been plenty of room on the bed of the truck for the employees to ride thereon without their legs hanging over the sides thereof. The length of the truck over all was about 18 feet. The width of the concrete pavement was about 18 feet, with shoulders on each side approximately two feet in width.

At the point above indicated, as the truck was proceeding in an easterly direction, the driver thereof, without giving any warning or intimation of his intention to make a left-hand turn, turned into a private driveway across the half of the road upon which the defendant was proceeding in a westerly direction. In making this turn the truck completely blocked the defendant's right-hand side of the highway. There was no available space left for the defendant to turn to the right. The defendant immediately applied his brakes and attempted to turn to the left. The right side of the Ford car sideswiped the right side of the truck and the leg of plaintiff's boot was caught in the handle of the door of the Ford car and the plaintiff's leg was injured. The record shows that the truck was turned to the left immediately in front of the Ford car when the Ford car was approximately distant only 75 feet.

The record also shows conclusively that the driver of the truck did not look in front of him to ascertain whether any car was approaching before actually turning to the left. His own testimony is to the effect that as he was turning, he saw the Ford car at a point about 60 feet distant. It appears also that the driver of the Ford truck, with a thoughtless impulse, applied the brakes instead of stepping on the accelerator, and stopped his truck so as to completely block the side of the road upon which the defendant was entitled to travel, and also partly blocked the opposite side of the paved highway.

The finding of the court upon which the judgment of this court is based reads as follows: "That as a direct and proximate result of the carelessness and negligence of the defendant Charles E. Greenamyer, Jr., in driving at excessive speed through the fog, and the carelessness and negligence of the said Gilbert Pitts, the driver of said truck, and as a direct and proximate result of the collision mentioned in the plaintiff's complaint, plaintiff received great, severe and painful injuries," etc.

We may here state that the record shows that the California Packing Company was not made a defendant in the action, as the industrial accident commission had taken jurisdiction of the case so far as the packing company was concerned and had awarded the plaintiff compensation.

The main portion of the defendant's appeal is based upon finding VI, which we have just quoted, and is to the effect that there is no testimony showing that the defendant was driving at an excessive speed, and also no showing that the presence of the fog which we have mentioned had anything to do with causing the collision; that the cause of the collision was solely and exclusively due to the negligence of the driver of the truck in turning his car without having made any observation as to whether the turn could be safely made into a private driveway.

The record shows that at the time of the collision the driver had with him on the driver's seat, two other persons, one of whom he asked to look to the rear, preceding the making of the turn. This person testified that he could see between 150 and 200 feet, and reported all clear in the rear. The testimony likewise shows a failure on the part of the two persons who were riding with the driver, to make any observations as to whether there were any cars approaching. Their testimony is to the effect that they did not see the approaching car until it was about the distance ahead which we have stated. This testimony shows conclusively that the turn was made at a time when cars were visible at a distance of between 150 to 200 feet. The record further shows that when the driver of the Ford car observed the turning of the truck to the left and across his side of the highway, he immediately applied his brakes and turned to the left in an attempt to avoid a collision. There is no testimony in the record to the effect that there was sufficient space left on what would be the south side of the highway, for the defendant's Ford car to pass by without coming in contact with the truck. The record further shows that there was no side skidding of the Ford car. Some of the witnesses did testify that there were skid marks made by the tires of the Ford car. This was contradicted, but such would be occasioned only by the violent application of the brakes, but the pavement was not sufficiently moist to cause any side skidding of the Ford car. It is further shown by the record that the Ford car was stopped within a distance of either 95 feet or 110 feet. The testimony is in substance as follows: One witness testified that the Ford car stopped within 20 feet of the point of the impact. Another witness estimated the distance at 30 feet. This testimony establishes the fact beyond controversy that the Ford car was stopped well within the range of visibility, and that the Ford car was not traveling at such an excessive rate of speed that it could not be stopped within the range of the driver's visibility. Even the driver of the truck testified that he could see at least 120 feet ahead of him.

The question arises: Has finding VI any support in the record?

The respondent calls our attention to the case of Flynn v. Kumamoto, 72 P.2d 248, a recent case decided by this court. The facts in that case are readily distinguishable from the questions presented upon the record here. In the Flynn Case it appears that two boys were riding on bicycles, proceeding in the same direction as the driver of the automobile which ran down one of the bicycle riders. The defendant driver in that case appears to have been blinded by the approaching lights of a car traveling in an opposite direction, and as his vision was restored, he observed the bicycle riders only a few feet in front of him, and the collision immediately occurred. The question of driving when one's sight is blinded by the approaching headlights of another car has been considered in many cases, and all the cases hold that it is the duty of a driver under such circumstances to slow down his car so that he can stop immediately. All the cases cited in the Flynn Case are to that effect. The conditions just recited show the inapplicability of the Flynn Case.

Another recent case decided by this court is that of Cannon v. Kemper, 73 P.2d 268. There the defendant was driving at 35 miles per hour on a foggy morning. His testimony is to the effect that the fog was so thick that he could only see approximately 25 feet ahead of him, and that it required at least 65 feet for him to stop his car.

The authorities cited in the foregoing cases all show that the driver of the offending car was being propelled at a speed far beyond visibility, and far greater than the possibility of stopping one's car within the range of visibility.

Section 510 of the California Vehicle Code, St.1935, p. 176, is cited in many of the cases to the effect that no person shall drive a vehicle upon a highway at a speed that is greater than is reasonable and prudent, having due regard for the traffic on, and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property.

Section 670 of the California Vehicle Code, St.1935, p. 222, sets forth in detail the distances within which cars should be equipped so as to bring the same to a stop when traveling at a particular speed. This section as to speed and stopping distance, refers particularly to dry asphalt or concrete pavement surfaces, where the grade does not exceed one per cent. In the schedule there set forth it is shown that upon a dry pavement, driving at 35 miles per hour, a car should be stopped within 113 feet. The record as we have stated shows a stopping of the defendant's car either within 95 feet or 105 feet, according to the testimony of the two witnesses, and whichever testimony is accepted establishes the fact that the car of the defendant was stopped on the so-called wet pavement within a distance which a car properly equipped is said to be stopped on a dry pavement within 113 feet. This excludes the idea that the defendant was driving at an unreasonable rate of speed on a highway where the California Vehicle Code, § 511, St.1935, p. 176, allowed a speed of 45 miles per hour, and where he was driving at a speed which permitted the stopping of his car within, at the outside, not over two-thirds of the distance of visibility.

[1, 2] While the law is clear that every driver of an automobile must keep a sharp lookout for others who may be using the highway and may anticipate the presence of others who may lawfully be upon the highway, there is no law and no reason to support the conclusion that the driver of an automobile will, without any reason whatever, violate the law and turn to the left in front of an approaching automobile so close as to render the avoidance of a collision almost impossible, and under conditions where, had he looked he might easily have perceived the approaching automobile and the hazard of making a left turn in front thereof.

Section 544 of the California Vehicle Code, St.1935, p. 185, requires that the driver of an automobile about to turn to the left shall give a signal thereof by extending his arm horizontally, and keep it extended for at least 50 feet before attempting to make the turn. Or, if the vehicle is equipped with a signal device, that device shall be used in the same manner. We may here state that the extending of the arm and then the withdrawal of the arm immediately, does not comply with the section. The requirement of keeping the arm extended for at least 50 feet is to enable approaching drivers to see the signal and take such precautions as may be necessary to avoid a collision. We may add further that the record fails to show that the driver of the Ford car did not do everything that he could do to avoid the impact with the truck.

[3] In view of what we have just stated, we do not perceive how it can be reasonably held that the collision and attendant injury to the plaintiff was not caused solely and exclusively by the negligence of the driver of the truck, who seems to have overlooked the fact that he had the safety and lives of eighteen persons in his charge.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 490

PEOPLE v. MELENDREZ et al.

Cr. 3063.

District Court of Appeal, Second District, Division 1, California.

March 25, 1938.

Hearing Denied by Supreme Court April 21, 1938.

1. Kidnapping 🔑6

Whether kidnapping of motorist by taking him away from automobile and holding him against his will at the point of a knife at a distance therefrom was for the purpose of robbery was for the jury. Pen.Code, § 209, as amended by St.1933, p. 2617.

2. Kidnapping 🔑1

The act of taking motorist from his automobile and holding him against his will at the point of a knife at a distance therefrom was an act of "kidnapping." Pen.Code, § 209, as amended by St.1933, p. 2617.

[Ed. Note.—For other definitions of "Kidnapping," see Words & Phrases.]

3. Kidnapping 🔑5

Evidence authorized conviction of kidnapping for the purpose of robbery on ground that young woman was taken away with intent of making certain the possession of the results of the robbery, notwithstanding that young woman was raped at the same time. Pen.Code, § 209, as amended by St.1933, p. 2617.

4. Robbery 🔑10

"Robbery" is not completed at the moment the stolen property is in the robber's possession, since "robbery," which is a combination of "assault" and "larceny," includes the element of asportation.

[Ed. Note.—For other definitions of "Assault," "Larceny" and "Robbery," see Words & Phrases.]

5. Kidnapping 🔑1

The asportation of young woman for the double purpose of robbery and rape authorized conviction of kidnapping for the purpose of robbery on ground that she was seized, kidnapped, and carried away with the intent to commit robbery. Pen.Code, § 209, as amended by St.1933, p. 2617.

6. Kidnapping 🔑5

Evidence that motorist was removed from possession of automobile and prevented from returning thereto by force and threats against his life, until after defendants had removed key from car and departed, authorized conviction of kidnapping for the purpose of robbery, notwithstanding that nothing was allegedly taken but key to the automobile. Pen.Code, § 209, as amended by St.1933, p. 2617.

7. Robbery 🔑24(2)

Evidence that the first things done by defendants after motorist and his young woman companion had been threatened with a knife was to seize the young woman's pocketbook from inside of automobile in which she and motorist were sitting, and that neither pocketbook or contents were ever returned, authorized conviction of robbery on ground that there was an original intent to rob notwithstanding other crimes committed upon the young woman later on.

8. Rape 🔑51(7)

Evidence that defendant was a member of group involved in seizure of motorist and woman companion, coupled with woman's positive testimony that defendant was the one who pulled her from car and committed an act of sexual intercourse upon her sustained conviction for rape notwithstanding alleged mistaken identity.

9. Criminal law 🔑409

Evidence coupled with admission to police officer that defendant had sexual intercourse with prosecutrix in back seat of automobile sustained conviction of rape notwithstanding uncertainty of testimony of prosecutrix.

10. Criminal law 🔑829(21)

A charge that proof of guilt beyond a reasonable doubt was necessary to conviction rendered nonprejudicial failure to instruct that conviction could be had of a lesser crime.

11. Robbery 🔑1

The taking of a pocketbook by means of force and fear and the threat of a deadly weapon is "robbery" and not "theft."

[Ed. Note.—For other definitions of "Theft," see Words & Phrases.]

12. Criminal law 🔑795(2)

Where the evidence showed that, if any offense was committed, it was the one charged, failure to instruct on a lesser offense was not error.

13. Criminal law 🔑1023(10)

An appeal will not lie from a sentence.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Joe Melendrez, Frank Olivas, and Tony Correa were convicted of kidnapping for the purpose of robbery, of rape, of robbery, and of another kidnapping for the purpose of robbery, and they appeal from sentence and judgments of conviction.

Appeal from sentence dismissed; convictions affirmed.

Gladys Towles Root, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

Defendants and appellants herein were charged with and convicted of the crimes of kidnapping for the purpose of robbery in violation of section 209 of the Penal Code, as amended by St.1933, p. 2617, as alleged in count I of the amended information; of rape, as alleged in count II; of robbery, as alleged in count III; and of kidnapping for the purpose of robbery, as alleged in count IV of said information. The two kidnapping charges involved two different victims, one a young woman and the other her companion, a man by the name of Child.

This appeal is taken from the sentence and judgments of conviction and from an order denying motions for new trial.

All of the appellants and one Jesus Pantoja, nicknamed "Chito," drove up in an automobile and stopped across the road and slightly to the rear of another automobile in which the young woman and Child were sitting, this car being parked on a road in the vicinity of Montebello in the county of Los Angeles between 11 and 11:30 o'clock of the evening of May 23, 1937. Chito was but seventeen years of age and was not made a defendant in the instant action. When appellants' car stopped, Chito and Correa got out and were followed a moment or two later by the other two appellants, Melendrez and Olivas. Chito opened the door of Child's car holding in his hand a knife with a five-inch blade, and took a pocketbook belonging to the young woman, which contained a sum of money. She never saw it again. Appellant Melendrez broke a window of the car and sustained a cut on his hand. Chito, holding the knife to Child's stomach, ordered Child out of the car and told him to walk. Child was backed for a distance of from 50 to 75 feet from the car and was required to remain there for about five minutes, during which time the young woman was pulled out of Child's car by appellant Melendrez and forced to the back of the car where she tried to get loose. She struggled, kicked and tried to bite Melendrez and when she started to scream he put his hands on her throat and choked her so that she could not breathe. Melendrez then hit her in the face and on the nose from which beating she sustained a black eye and a bruised face. After being struck a great many times, she fell to the ground. She tried to arise but was very much dazed from the blows she had received, and while on the ground appellant Melendrez committed an act of sexual intercourse upon her. She was then picked up from the ground and shoved into the back seat of appellant's car, Melendrez, who sat on the back seat with her, covering her face and mouth with his hands. Appellants Correa and Olivas occupied the front seat with Olivas driving. After the car was started and in motion, it was slowed down in order to allow Chito, who had been keeping Child away at the point of a knife, to run and jump in; whereupon a gasoline-soaked cloth was placed over the young woman's face. She was then jammed into a corner of the car and while her feet were held by someone in the front seat, two acts of sexual intercourse were committed upon her, one by Chito and the other by a different man, whose face prosecutrix did not see. The car was then driven into the hills of Montebello where it was stopped and the prosecutrix taken out, shoved off the road and down an incline to a hollow spot among a lot of tin cans, where appellant Correa had sexual intercourse with her. As soon as appellants left she ran down the road to a highway and was taken home by a passing motorist. When the young man returned to his car the key was gone and he ran to a house three-quarters of a mile away where he telephoned to the authorities. Between 1 and 2 o'clock the next morning, Child examined his car but was unable to find either the pocketbook or the key, and never saw either article again.

Appellants complain that the evidence is insufficient to support the verdict as to the crime of kidnapping for the purpose of robbery or to support the charge of robbery. They also maintain that the evidence is insufficient to support the verdict of rape against Olivas and Melendrez, and that the court erred in refusing to give instructions regarding grand theft and petty theft.

[1-5] Under the facts and circumstances in evidence, it was a matter for the jury to

determine just what was the object of the kidnapping. When appellants took Child away from the car and held him against his will and at the point of a knife at a distance therefrom, they committed an act of kidnapping as to him, and by holding him in that position they succeeded in getting away with the proceeds of the robbery. The jury was justified in determining that the young woman was taken away for the purpose and with the intent of making certain their possession of the results of the robbery, in spite of the fact that they committed other crimes upon her, of which crimes they were all found guilty. It has been held in numerous cases that "the perpetration of a robbery is not completed the moment the stolen property is in the possession of the robbers. Robbery, a combination of the crime of assault with that of larceny, includes, as does larceny, the element of asportation, and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized" (People v. Raucho, 8 Cal.App.2d 655, 664, 47 P.2d 1108, 1112); that "the escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property" (People v. Boss, 210 Cal. 245, 251, 290 P. 881, 883). The fact that the appellants may have had the intention of ravishing the female victim at the time they moved her across the street or when they compelled her to depart with them in their car, if such intent then existed, does not eliminate their intent to rob her, and the asportation of the young woman for the double purpose of robbery and rape would of necessity support the conclusion that she was seized, kidnapped, and carried away with the intent to commit robbery.

[6, 7] Appellants' objection that nothing was taken from Child is not good for the reason that his car was seized at the time he was removed from it. Not only that, but the key to his car was taken and he never recovered it. Although appellants did not take Child's car, they removed him from the possession of it by force and threats against his life, and by such force and threats of death he was prevented from returning to his car until after they had removed the key therefrom and had departed from the scene. Child was held under the threat of the knife until all of the appellants started away in their car which only slowed down long enough to pick up the party participating in the robbery with them, who is not an appellant herein. There was sufficient evidence to entitle the jury to believe that there was an original intent to rob at the time the appellants stopped their car near Child's car. The fact that the first thing done by appellants after Child and his young woman companion had been threatened with the knife was to seize and take the young woman's pocketbook from the inside of the car in which she and Child had been sitting, and that neither said pocketbook nor its contents was ever returned to her, even though she made demand for such return, furnishes the link, which appellants claim is missing, to prove that they had the intent to commit robbery at that time. When Child was finally released, the ignition key of his car was gone, appellants having stolen it with the idea of escaping with their loot, not knowing what the pocketbook contained, as it was not opened in the presence either of Child or of the young woman. In a conversation with the police, appellant Correa stated that the pocketbook was emptied, the money taken from it and the purse itself thrown away when appellants stopped at the time the young woman was last assaulted, after they had ejected her from their car.

[8, 9] The objection that the evidence is insufficient to support a conviction of the crime of rape against Olivas and Melendrez depends upon a misstatement of the testimony of complainant. The fact that appellant Melendrez himself denied the relation and asserted that he promptly reported the occurrence to the sheriff's office does not make out his case of mistaken identity. He was a party to the entire transaction—it was he who broke the window in the car; and the prosecutrix was positive in her testimony that he was the one who pulled her out of the car, hit her in the face, knocked her to the ground and committed an act of sexual intercourse upon her while she lay upon the ground. The evidence is sufficient to justify the jury in believing Melendrez was guilty, as charged. All of the testimony is direct and positive that appellants Melendrez and Correa committed the crime of rape against the prosecutrix. The situation as to appellant Olivas is somewhat different in that, while all of the evidence shows the prosecutrix believed that Olivas perpetrated the crime charged against her, her own testimony standing by itself without evidence of the surrounding circumstances would probably be insufficient to convict him of that particular crime. However, there is in evidence his admission made to a police officer immediately after the occurrence that he had sexual intercourse with the complain-

ing witness in the back seat of the automobile which, together with the other facts and circumstances shown by the record, is sufficient to convict him of the offense charged. The shock and strain sustained by prosecutrix during this terrible ordeal would account for any uncertainty in her testimony, and this is especially so by reason of the fact that, at the time of the commission of this crime by appellant Olivas, a handkerchief saturated with gasoline had been placed over her face which nauseated her.

[10-12] The jury was instructed in effect that it could not find any one of the appellants guilty of any of the crimes charged, unless it found beyond a reasonable doubt that such appellant was guilty of the crime or crimes charged; therefore, there can be no prejudice as to any of the appellants by reason of the failure of the court to instruct that appellants could be convicted of a lesser crime. There was no evidence that the lesser crime of theft was committed. When appellants took the young woman's pocketbook they accomplished it by means of force and fear and the threat of a deadly weapon, and when property is so taken the crime is robbery and not theft. Therefore, it is not error to fail to instruct on a lesser offense than the one charged, at least where the evidence shows that if any offense was committed it was the one charged. See People v. Madison, 3 Cal.2d 668, 676, 46 P.2d 159.

[13] The appeal from the sentence is dismissed, there being no such appeal known to our law. The judgments and the order denying motions for new trial are affirmed.

We concur: DORAN, J.; WHITE, J.

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25 Cal.App.2d 466

ISETT v. FREES et al.

Civ. 11778.

District Court of Appeal, Second District, Division 2, California.

March 23, 1938.

Appeal and error ⇨434

Where appellant filed no transcript or brief within time provided by law, he had not appeared and motion to dismiss the appeal would be granted.

Appeal from Superior Court, Los Angeles County.

Action by George W. Isett against Ben Frees and another. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion to dismiss the appeal granted.

William C. Ring and James L. Crawford, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

PER CURIAM.

Upon submission of the motion to dismiss the above-entitled cause, the presiding justice in open court made the following statement:

This case comes before the court on a motion to dismiss. The appellant has not appeared in the case; that is, there has been no transcript or brief filed within the time provided by law. The motion is good and it is granted. In re Yahne, 193 Cal. 386, 224 P. 452; In re Wignall, 193 Cal. 387, 224 P. 452.

GIBSON PROPERTIES CO. et al. v. CITY OF OAKLAND.*

Civ. 10546.

District Court of Appeal, First District, Division 2, California.

March 25, 1938.

Hearing Granted by Supreme Court May 23, 1938.

1. Eminent domain ⇨246(2)

A statute prescribing time within and terms upon which right to abandon condemnation action may be exercised is intended to meet abuses arising out of resort to the action without seriously intending to prosecute it to a conclusion. Code Civ.Proc. § 1255a.

2. Eminent domain ⇨246(4)

Generally, on abandonment of condemnation proceedings, no cause of action accrues to an owner, in absence of statute, for loss, damage, or inconvenience suffered by him in anticipation that proceedings would eventuate in the taking for compensation of his property for public use, unless proceedings were instituted or prosecuted in bad faith, or were unreasonably, deliberately, or willfully protracted.

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*For subsequent opinion see 83 P.2d 942.

3. Eminent domain ⟹246(4)

A proposed landlord and tenant of warehouse had no cause of action against city, on abandonment of proceedings to condemn strip from land on which warehouse was being built, because of changes in design and construction of warehouse in anticipation that strip would be taken, notwithstanding that city ordered landlord to desist from building operations on strip, in absence of bad faith in instituting or prosecuting proceedings or unreasonable delay therein, and in view of statute authorizing abandonment of proceedings without providing for any such cause of action. Code Civ.Proc. § 1255a.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the Gibson Properties Company and another against the City of Oakland for damages in the changes in design and construction of a building made in anticipation that street-opening proceedings, later abandoned, would be carried through to completion. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Melville C. McDonough and Raymond C. Gericke, both of Oakland, for appellants.

F. Bert Fernhoff, City Atty., and Hilton J. Melby, Asst. City Atty., both of Oakland, for respondent.

GOODELL, Justice pro tem.

This appeal was taken from a judgment for the defendant in an action at law for damages claimed because of changes in the design and construction of a building made in anticipation that street-opening proceedings, later abandoned, would be carried through to completion.

In March of 1926 the appellant Gibson Properties Company had acquired title to an irregularly shaped piece of land in Oakland within the block bounded on the west by Franklin, on the south by Water, on the east by Webster, and on the north by First street, upon which it proposed to erect a three-story concrete warehouse for the appellant Lawrence Warehouse Company. On March 15, 1926, the Properties Company made a lease to the Warehouse Company of the proposed warehouse, according to plans and specifications then prepared, for a term ending October 15, 1946, for a total rental of $900,000. About this time the Properties Company was granted a building permit, and on April 2, 1926, it made a contract for the construction of the warehouse for $296,000, which was to cover the entire area owned by the Properties Company, the northerly line of which, extending for 100 feet, was the southerly line of First street. On April 15, 1926, a letter was written by the commissioner of public works, referring to the fact that a building permit had been issued, indicating that street-opening proceedings were going to be started and that the street to be opened would impinge upon the Properties Company lot, and suggesting "that before definite plans are made for any construction it would be advantageous to yourselves and the City if a conference could be arranged." Work was, nevertheless, started on the warehouse. On June 17, 1926, the respondent, by ordinance, declared its intention to widen First street for the two blocks from Broadway to Webster street, under the Street Opening Act of 1903, St.1903, p. 376, as amended, which opening, the ordinance showed, would add to the width of First street by taking 20 feet off the northerly side of the two blocks in question. The Properties Company had designed on the northerly 20 feet of its lot and within the walls a spur track so depressed that the floor of a railroad car would be level with the floor of the warehouse. As soon as the ordinance of intention was passed, the respondent's commissioner of public works notified the Properties Company in writing of the passage, and ordered it to cease and desist from any building operations upon the 20-foot strip, which order was at once obeyed. Before the ordinance had been passed, the foundation of the north wall of the building had been laid along the south line of First street, forms for the pouring of the concrete for the entire height of the building's north wall had been made, the excavation for the depressed track had been dug, and certain other work had been done. Appellants then had their plans redrawn, setting the north wall back, or southerly, 20 feet from its original location, setting the elevator pit, likewise, 20 feet back, and eliminating the depressed track. The cost of these changes and the redesigning of the building was $5,696.60, which the court found was the reasonable value of that work. As reconstructed the building occupied 98.4 per cent. of the ground area and contained 95.35 per cent. of the floor space originally planned. On September 16, 1926, an ordinance was adopted ordering the widening of First street, in the manner already indicated, and directing condemnation proceedings. A condemnation suit was filed on October 29, 1926, and eventually went to trial, resulting in an interlocutory judgment on July 9, 1929, awarding the appellants $33,997.

On September 15, 1931, the respondent adopted an ordinance repealing the ordinance of intention and all proceedings thereunder, and on December 11, 1931, filed, in the condemnation proceedings a notice of abandonment and request for dismissal. On December 16, 1931, the court dismissed the condemnation suit.

May 12, 1933, the complaint was filed in the instant case alleging most of the facts just stated, and claiming general damages in the sum of $55,392 and special damages of $5,696.60 for the Properties Company and $24,608.93 for the Warehouse Company.

The court made findings, of which the foregoing is a fair resume, but it declined to award judgment in favor of appellants. It should be observed that the complaint alleged that the delay in the proceedings "was and is unreasonable and without cause," but no bad faith in the commencement or prosecution of the proceedings was claimed. The court found that it was not true that the delay complained of was and is unreasonable and without cause, although it did find that the respondent could have completed the proceedings in a shorter time, but that the work proposed by the resolution of intention was commenced "in good faith, continued in good faith, and terminated in good faith."

The fact that the court awarded no judgment for the $5,696.60 (expended by the Properties Company in anticipation that the proceedings would culminate in a taking of the 20-foot strip) indicates that it viewed this as a case of damnum absque injuria.

No question is raised on this appeal as to the right of a condemning party to abandon a project and the proceedings thereon without incurring liability to an owner to pay the judgment awarded. It was held in Pool v. Butler, 141 Cal. 46, 74 P. 444, that this could be done. After that decision the Legislature, Stats.1911, p. 377, codified this rule in section 1255a, Code of Civil Procedure, which prescribes the time within and the terms upon which the right may be exercised. In proceedings under the act of 1903, however, it has been held that the time limitation of section 1255a does not apply, but that section 14 of that act, Stats.1903, pp. 376, 379, as amended by St.1911, p. 894, does. Bank of America v. City of Glendale, 4 Cal.2d 477, 481, 50 P.2d 1035. That section provides that: "The city council may, at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings, by ordinance, and cause the said action to be dismissed, without prejudice."

[1] Thus it will be seen that the Legislature wrote certain conditions into section 1255a, but it omitted all provision for the payment of damages arising from circumstances such as are here involved; and section 14 of the 1903 act, as amended, imposes no conditions at all. There was every opportunity for the Legislature to speak upon this subject, for the courts have commented upon the fact that section 1255a was enacted "to meet certain abuses arising out of resort to the action without seriously intending to prosecute it to a conclusion." Pacific Gas & Electric Co. v. Chubb, 24 Cal.App. 265, 270, 141 P. 36, 38. See, also, dissenting opinion in Los Angeles v. Clay, 126 Cal.App. 465, 469, 14 P.2d 926.

[2, 3] It seems to be settled by the weight of authority in the United States that upon the abandonment of a condemnation proceeding no cause of action accrues to an owner, in the absence of statute, for loss, damage, or inconvenience suffered by him in anticipation that the proceeding would eventuate in the taking, for compensation, of his property for public use, unless the proceedings were instituted or prosecuted in bad faith, or were unreasonably, deliberately, or willfully protracted. 20 C.J. 1086; 31 A.L.R. 352. Indeed, the appellants seem to concede this to be the general rule, but they claim that this case is exceptional. In their closing brief they sum up their position as follows: "Appellants admit that in general a municipality may institute and thereafter abandon a condemnation suit

without liability for damages. But when the property owner is so situated that he must change position because of his contracts with third persons, is under a legal duty to change position in order to minimize damage, receives a mandate from the municipality directing that he change position, and he is assured by the City that he will have his day in court as to any damages he may suffer, and the City elects to avail itself of the drastic provisions of the 1903 Street Opening Act, and the owner does thereupon change position, to his monetary detriment, the City will not be permitted to deny liability."

The following leading cases are all street opening cases which are parallel to the case at bar save as to the elements of claimed loss or damage: Carson v. Hartford, 48 Conn. 68 (action for delay in the sale of the property and loss of profitable use thereof); Feiten v. Milwaukee, 47 Wis. 494, 2 N.W. 1148, 1150 (action for loss of rent; unnecessary delay alleged); McRostie v. Owatonna, 152 Minn. 63, 188 N.W. 52, 53 (where a barn was razed in anticipation of ultimate condemnation, and where the charter gave the right to abandon "upon payment of all costs and disbursements of the adverse party"). All three cases are discussed in the annotation at 31 A.L.R. 352, 365–367, where many other cases are collected. In the Feiten Case, supra, one of the reasons for the rule is given as follows: "If there be injury without wrong, it is damnum absque injuria. Any other rule would render the institution of proceedings looking to the condemnation of property for public improvements exceedingly perilous to the municipality." Howard v. Illinois Central R. Co., 7 Cir., 64 F.2d 267, was an action for damages for deprivation of the possession and free and unrestricted use of the owner's land over a period of ten years. A demurrer to the complaint was held to have been properly sustained. At page 271 the court says: "There may be a hardship in compelling an owner to hold his property in uncertainty awaiting the conclusion of a condemnation suit and the determination as to whether his property will be taken or not; but the inconvenience is the same kind which attends all proceedings in taking land for public improvements, and which is incident to the ownership of property in a community, and especially in a city. However, where such are the only facts relied upon, the law gives no cause of action to the owner for his incidental expenses and inconvenience. Stevens v. Borough of Danbury, 53 Conn. 9, 22 A. 1071; Carson v. City of Hartford, 48 Conn. 68. *This rule seems to be the universal holding of the courts in all jurisdictions, in the absence of a local statute to the contrary.* Winkelman v. Chicago, 213 Ill. 360, 72 N.E. 1066." (Italics ours.)

James v. Toledo, 24 Ohio App. 268, 157 N.E. 309, has many features similar to the instant case. There the owner, intending to build, obtained from the city a building permit; construction work had started when the city instituted condemnation proceedings to open a street, and when it did so it revoked the building permit pursuant to which the owner had, in the best of faith, started work. The proceedings were abandoned, yet the owner was denied redress.

In support of their position that this is an exceptional case, the appellants rely upon the cases of Times-Mirror Company v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925, 926, and City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002, but a careful examination shows that the facts in none of them are at all comparable with those in the case at bar. The opinion in the Times-Mirror Case sets forth in detail the history of that litigation and shows clearly and convincingly why the conduct of the officials worked an estoppel against the city. In addition to that, the attempted abandonment came approximately one year and five months after the thirty-day period limited by section 1255a, Code of Civil Procedure. It would unduly prolong this opinion to herein summarize the facts of that case with a view to pointing out how aggravated was the situation there presented and how unlike the case at bar. At page 331 of 3 Cal.2d, page 557 of 44 P.2d the court says: "The unusual circumstances in this case would require the application of the doctrine announced in City of Los Angeles v. Cohn, supra, even though no such precedent existed," and the opinion quotes extensively from the Cohn Case, a reading of which will show the dissimilarity between the Cohn Case and the case at bar. The McGee Case, likewise, is quite distinguishable. The decision of that case turned upon a stipulation which had been entered into by the condemning city and the property owner, and the Supreme Court simply held the city to the performance of its stipulated obligation, holding that the case presented "one of those exceptional situations" recognized in the Times-Mirror and Cohn Cases, "where justice and right require the invocation of the principle of estoppel in pais in favor of a citizen or private party and against a municipality." Mr. Justice Garoutte characterizes the Cohn Case, 101 Cal. 373, 378, 35 P. 1002, as a "law unto itself." We see nothing exceptional about the case at bar to bring it within the rule of the three cases last cited or without the general and prevailing rule heretofore discussed.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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25 Cal.App.2d 459

TODD v. WALLACE et al.

Civ. 2201.

District Court of Appeal, Fourth District, California.

March 22, 1938.

Hearing Denied by Supreme Court May 19, 1938.

1. **Boundaries 🔑37(5)**

Evidence sufficiently established location of fence, which adjoining landowners erected when true boundary was uncertain and recognized as true boundary for many years, and part of which had been removed, to support judgment fixing fence line as boundary.

2. **Boundaries 🔑37(5)**

Evidence that two official corners of section could not be found under original field notes of government surveyor, that owners of land on each side of boundary beginning exactly between such corners and running perpendicular to section line erected fence on approximately the true boundary, piling rocks along fence, and used road along fence for over 40 years, and that right of way was reserved for road in many deeds describing road as lying along true boundary, sufficiently established uncertainty of true boundary and agreement on fence line as boundary to support judgment fixing fence line as boundary.

3. **Boundaries 🔑33**

To establish an agreed boundary, it is necessary to show an uncertainty or belief of uncertainty in location of line, an agreement, express or implied, fixing line, actual designation of line upon the ground, and occupation in accordance therewith, but such uncertainty and agreement may be inferred from conduct of parties, particularly from long acquiescence.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action to quiet title by John A. Todd against Sena M. Wallace and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

John Preston King, of Lindsay, and Waldo E. Burford, of Porterville, for appellant.

Halbert & Stone, of Porterville, and Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondents.

BARNARD, Presiding Justice.

This action was begun as a quiet title action but the issues were so narrowed that the only controversy at the trial was as to the location of the boundary line between the properties owned by the respective parties, and the plaintiff has appealed only from that portion of the judgment which fixes the boundary line between the two tracts of land.

The appellant is the owner of the northeast quarter of section 25, township 21 south, range 28 east, Mount Diablo base and meridian. The respondents are the owners of 80 acres of land lying immediately west of said land and being the east half of the northwest quarter of that section. About 40 years before the trial of this case, at a time when these two parcels of real property were in separate ownership, a fence was erected somewhere near the true boundary line between these properties and extending the entire distance from the north to the south lines thereof. The north half of this fence was removed about the year 1915, but the south half remained until 1934, when it was removed by the appellant, although certain posts and post holes remained at the time of the trial. For about 40 years, and up to the time of the trial, a roadway has existed along the westerly side of this fence beginning at the north line of these properties and extending approximately three-fourths of the way to the south line thereof. The traveled portion of this road was about 8 feet wide and was about 2 or 3 feet westerly from this fence. The road was a hard dirt road, well defined, and was used by the parties to this action, their predecessors, and the public generally. Beginning with a deed in 1896 the conveyances of the northeast quarter of the northwest quarter of this section, being the north 40 acres of respondents' land, have contained a reservation for a right of way for a road 20 feet wide along the east line of said forty acres.

Many years before these parties acquired their respective lands rocks were piled along the fence which has been described, beginning near the center of the fence and extending some 500 feet southerly therefrom, which pile of rocks remained up to the trial of this action. In 1915 a predecessor of the appellant set out orange trees opposite the north 40 acres of the respondents' land. At that time the north half of the fence was still in place and the last row of trees was set about 12 feet easterly from that fence. About the same time orange trees were set out on the north 40 acres of respondents' land. The testimony is that there was a space from 40 to 50 feet wide between these two orange orchards. This would indicate that respondents' predecessor set out the trees on that land from 8 to 18 feet westerly from the 20-foot strip which had been reserved for road purposes. Shortly after these orange trees were planted, the north half of this fence was taken down and at a subsequent time the appellant's immediate predecessor repaired the south half of this fence. After the north half of the fence was removed, the land immediately west of its former location was used by both owners, both as a roadway and as a place in which to turn farming implements. The respondents acquired their land in 1924 and the appellant acquired his land in 1928. In 1930 the respondents set out citrus trees on the south 40 acres of their land, the easterly row of trees being about 23 feet west of the old fence, that part of which was then standing. They also installed a cement pipe line for a distance on the south 40; which was installed from 18 to 22 feet west of the old fence and rock pile. While these improvements were being made, the appellant appeared on the scene, inquired about what was being done, and, on being told, expressed complete approval. In 1934 the appellant tore down the south half of the fence which had remained in place until that time and built a new fence on a line 20 feet west of the old location. This brought on a controversy between the parties and this action followed.

The court fixed as the boundary the line of the old fence, finding that this boundary had been established by agreement and acquiesced in for many years. It also found that the appellant was the owner of an easement and right to travel over and use as a roadway and for turning implements, a strip of land from 11 to 14 feet in width on the west side of the boundary thus fixed, which strip begins at the north line of respondents' north 40 acres, and extends to a point 600 feet south of the south line of that 40 acres.

The appellant contends that the true boundary line between these properties was shown by the testimony of a surveyor employed by him and that the effect of the judgment entered is to transfer the westerly 12 to 14 feet of his land to the respondents. It may be observed that aside from personal feelings there does not appear to be very much involved on this appeal. The appellant was given an easement to travel over, and use for turning, a strip of land varying in width from 11 to 14 feet to the west of the boundary as fixed by the court. If the legal title to that strip had been given to the appellant, it would still have been subject to a similar easement in favor of others since the roadway had been used in that location for so many years.

[1] It is first argued that the evidence is not sufficient to sustain the judgment, in that there was no definite evidence from which the court could find the exact location of the fence which formerly stood between these properties. In so far as the south half of this fence is concerned, certain posts and post holes and the long pile of rocks remained at the time of the trial, and the location of that part of the fence was definitely fixed. A post still remained at about the center of the fence opposite the south line of the north 40 acres of respondents' property. It is said that the north end of the fence was not definitely located, since one witness testified that at its north end the fence was "ten or twelve feet" from the trunks of appellant's nearest row of orange trees. However, the roadway was still there, and there was testimony that it had been used up to the time of the trial and that it had remained in the same location during all of the years. The trial judge went out to the premises and, un-

der his direction, measurements were taken by a county surveyor. It was about 15 feet from the easterly edge of the traveled portion of the road to the trunks of the nearest orange trees near the north line of these properties. There was testimony that the easterly edge of the traveled portion of the road was some two or three feet west from this fence as it formerly stood. The court fixed the location of this fence from the testimony and from these measurements and, while there is a conflict in the evidence, there can be no question that the exact location of the fence was rather clearly established.

[2] It is next urged that the evidence is not sufficient to show any agreement that the line of the fence should constitute the boundary or that any uncertainty as to the location of the true boundary existed when any agreement was made. It is argued that the government survey of these lands was on file, was always available for use, and that, therefore, there could have been no uncertainty with reference to the location of the boundary which could have been readily ascertained at any time. A surveyor employed by the appellant testified as to the survey made by him from which he gave what he considered to be the true boundary between these properties, being the line between the northwest quarter and the northeast quarter of this section. In making this survey he had with him a copy of the original field notes of the government surveyor who established the official corners of this section. He admitted that he was unable to find three of these corners. He accepted as the northeast corner of the section a pipe and rock which he found in that locality, although he did not know who placed them there and although they agreed with nothing in the notes of the government survey. He took a point at the northwest corner of the section which he admitted was not the northwest corner marked and described by the government surveyor he took as the southeast corner of the section an oak post in a rock mound, although this was on a bluff and the government surveyor had noted that at that corner the slope was so steep he could not set anything there, so he had set the post one chain south of the true corner; his north line of this section was 32.18 feet shorter than the same line described by the government surveyor; his east line was 29.8 feet shorter than the government line; his south line was 23 feet longer than the government line; and his west line was 75.8 feet shorter than the government line. He arrived at what the appellant calls the true boundary line between these properties by bisecting the north and south lines thus taken by him and running a line north and south between the bisection points. A present uncertainty certainly existed as to the location of this boundary line, and it may fairly be inferred from the evidence either that such an uncertainty existed at the time the fence was built and the road established or that the parties then attempted to place the fence on the line, and either did so or were unable to do so because of the uncertainty which then existed.

The evidence justifies the inference that the line on which the fence was built was accepted and agreed to by the parties as the boundary line. It was built approximately, if not exactly, on the middle line of that section. It is apparent from the government surveyor's field notes that this is a somewhat rough country and that the true line would be difficult to find, if this is possible at all. The fact that the road was placed in that location so many years ago is a strong indication that that was considered the true line, especially since in the many deeds a right of way for such a road was reserved over the east 20 feet of the northeast quarter of the northwest quarter of this section. Not only was the road thus located on the ground, but a fence was built in a corresponding position and rocks were piled along a large part of this fence. From the size and location of this rock pile it may be inferred that the rocks were taken from the land on both sides. The road was used for about 40 years, half of the fence remained for the same time and the other half stayed for some 20 years. The respective parties improved their places and set out trees corresponding to the line of the fence and road, and for some 40 years no question was raised by the owner of either parcel of land.

[3] It is well settled that in order to establish an agreed boundary line it is necessary to show an uncertainty or belief of uncertainty in the location of the line, an agreement, express or implied, fixing the line, an actual designation of the line upon the ground, and an occupation in accordance therewith. In Roberts v. Brae, 5 Cal. 2d 356, 54 P.2d 698, 699, the court said:

"However, in considering the nature and character of proof required to show such uncertainty and to establish such an agreement, the authorities are equally clear that in the absence of direct evidence, the same may be deduced from circumstances and may be inferred from the conduct of the parties, particularly from long acquiescence. In Vowinckel v. N. Clark & Sons, 217 Cal. 258, 260, 18 P.2d 58, it is stated: 'It is not necessary that the agreement between the parties be an express one. It may be inferred or implied from their conduct, especially where the condition is acquiesced in for the period of the statute of limitations. * * * "A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both the adjoining owners have definitely defined such line by erecting a fence or other monument on it and that both have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location."' * * *

"In Clapp v. Churchill, 164 Cal. 741, 745, 130 P. 1061, 1062, it is declared that 'the doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. * * * This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line.' This is recognized in Board of Trustees v. Miller, supra, 54 Cal.App. 102, at page 106, 201 P. 952."

The following language from Perich v. Maurer, 29 Cal.App. 293, 155 P. 471, 472, is appropriate here:

"The fence itself is a monument, visible and obtrusive, which has existed for forty years or more, that under the peculiar circumstances of this case is quite persuasive in favor of the claim of defendants. It is a fair presumption that this fence was originally placed upon the true line as then recognized and understood, and it is proper to assume, in the absence of evidence to the contrary, that when the fence was built, either that the contiguous owners had knowledge and information of the lines of the Sutter survey and acted accordingly, or that the true line was uncertain and by agreement it was fixed and marked by said fence. It is not surprising that this fence seemed so important to Boyd and to the trial judge. Its existence for so many years, the recognition accorded it as the true boundary, the acquiescence of the respective owners in the location and the improvements made accordingly, were rightfully regarded as important, if not decisive, considerations in the determination of a line otherwise obscure and uncertain. It is true that no one testified directly that the boundary was actually located on the ground or that there was uncertainty in reference to it, but such may be fairly inferred from the various facts disclosed, and we may invoke the principle announced in Schwab v. Donovan, 165 Cal. 360, 132 P. 447, and cases therein cited. This must be especially true since there is no clear and satisfactory showing here that the legal title is different from what is indicated by the fence."

Under the rules set forth in these cases and others which might be cited, we think the evidence which appears in this record, with the inferences reasonably to be drawn therefrom, supports the findings and judgment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

25 Cal.App.2d 513

PEOPLE v. BROWN.

Cr. 429.

District Court of Appeal, Fourth District, California.

March 25, 1938.

1. Sodomy 🔑1

Specific intent is not necessary element in offense of sex perversion. Pen.Code, § 288a.

2. Criminal law 🔑742(2)

Whether prosecuting witnesses in trial for sex perversions were accomplices was law question for court, where their acts were admitted and facts were undisputed. Pen. Code, § 288a.

3. Criminal law 🔑507(7)

Prosecuting witnesses in trial for sex perversions were accomplices as matter of law, where one of them testified that defendant used no force and that witness made no objection until after completion of crime, while the other, claimed by defendant to have been drunk at time of offense, testified that he knew and fully understood what was happening. Pen.Code, § 288a.

4. Criminal law ⚿369(2), 1169(11)

Evidence, in trial for sex perversions, that defendant ran ostensible turkish bath place, used by many persons for commission of such offenses, with knowledge of such fact, was inadmissible and prejudicial to defendant, in absence of evidence connecting such occurrences thereat with offenses charged. Pen.Code, § 288a.

5. Infants ⚿20

Evidence, in trial for contributing to minors' delinquency by encouraging or permitting them to be or remain in place used for commission of sex perversions, that defendant ran ostensible turkish bath place used for such purposes with his knowledge, was admissible to show sort of place in which defendant encouraged such minors to remain. St.1915, p. 1225, as amended.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Jack Brown was convicted of sex perversions with, and contributing to the delinquency of, two minors, and he appeals.

Affirmed as to convictions of contributing to minors' delinquency, and reversed and remanded as to other convictions.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was prosecuted on an information containing four counts. In count I he was charged with a violation of section 288a of the Penal Code in connection with a named individual. In count II he was charged with a violation of the Juvenile Court Law, St. 1915, p. 1225, as amended, in having contributed to the delinquency of this individual, who was alleged to have been a minor. In count III he was charged with a violation of section 288a on another occasion in connection with another minor, and in count IV he was charged with another violation of the Juvenile Court Law with respect to that person. Having been convicted by a jury on all four counts, a judgment was entered covering the two counts of sex perversion and a separate judgment on the contributing charges. He has appealed from both judgments and from orders denying motions for a new trial.

[1-3] We will consider first the appeal from the judgment covering counts I and III of the information. The first assignment of error which need be considered is that the trial court committed prejudicial error in refusing to instruct the jury that the two minors involved in these charges, who appeared as witnesses against the appellant, were accomplices. The respondent argues that it does not necessarily appear that these witnesses were accomplices and that whether or not they were was a question of fact which was properly left to the jury. The one concerned in the charge set forth in count I of the information, in testifying as to what occurred at the time in question, said that he made objection and pushed the appellant away. It is argued that this shows that he did not voluntarily participate in the affair and, therefore, was not an accomplice. It fully appears from this witness' own testimony that the appellant used no force and that the witness made no objection until after the crime had in fact been completed. The respondent argues that the witness connected with the charge involved in the third count was not an accomplice since he was drunk at the time. Not only is the question of specific intent not a necessary element in this offense (People v. Avanzi, Cal.App., 77 P.2d 237), but it affirmatively appears from the testimony of this witness that he knew and fully understood what was going on at the time in question and for at least two hours thereafter. The acts and conduct of these witnesses were admitted, the facts were not in dispute, and the question whether or not those acts and facts made the witness an accomplice was in each of these cases a question of law for the court. It affirmatively appears from the testimony of these witnesses that each of them was an accomplice and the requested instruction should have been given. People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Swoape, 75 Cal.App. 404, 242 P. 1067.

[4] It is next urged that the court committed prejudicial error in admitting in evidence testimony tending to show the commission by the defendant, and others

of many acts of misconduct not connected with the offenses charged in this information and having no bearing on any issue involved in the trial of those charges. A great deal of evidence was received to the effect that the appellant was running a place, ostensibly a turkish bath, which had for some time been resorted to by many individuals and used by them as a place for violating section 288a of the Penal Code, and that the appellant had knowledge of the use to which his premises had been put. No attempt was made to connect these occurrences with the matters here involved except to show the nature of the place run by the appellant. This evidence, received over the objection of the appellant, was largely stressed by the district attorney in his argument to the jury.

In our opinion this evidence was inadmissible in so far as the charges contained in counts I and III are concerned, and the effect thereof could not have been other than prejudicial. People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Asavis, Cal.App., 71 P.2d 307. The general rule that evidence of other crimes is incompetent has been relaxed in a few cases involving a specific intent. But the only question with respect to these charges was whether certain acts had been performed and no question of the intent with which such acts had been performed was involved. The fact that the appellant was running a place of the character described indicates that he should have been prosecuted on other charges, but neither proves nor tends to prove that he committed these particular acts. Regardless of what other crimes he may have committed he was entitled to a trial on these charges under the established rules of evidence.

[5] With respect to the two counts charging violations of the Juvenile Court Law a different situation appears. In both of those counts the charges were so stated as to include the encouraging or permitting of a minor to be or remain in or around a place of the nature of that shown by the testimony to have been run by the appellant. As to these counts the evidence which has been referred to was admissible for the purpose of showing the sort of place in which the appellant encouraged these minors to remain, although this evidence should have been received for this purpose only and so limited by the court. Of course, as to these contributing charges these minors were not accomplices.

The judgment covering the two violations of the Juvenile Court Law, St. 1915, p. 1225, as amended, is affirmed. The judgment on the other two counts is reversed, and that part of the cause remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 474

CROFTS v. NICOLAIDES et al.

FOX FURNACE CO. v. SAME.

Civ. 10667.

District Court of Appeal, First District,
Division 2, California.
March 24, 1938.

1. Appeal and error ⇨935(3)

On appeal from judgment denying third party claims, consolidated by stipulation for hearing under statute eliminating fact findings, in execution proceeding, all applicable presumptions and inferences must go to support of judgment. Code Civ.Proc. § 689, as amended.

2. Appeal and error ⇨935(3)

The District Court of Appeal will assume in support of judgment, denying third party claims in execution proceedings, that trial court found that partnership, formed by judgment debtor and one claimant after issuance of execution on one judgment, and claimant corporation, formed by such parties after release of garnishment against money due partnership, were mere instruments used by debtor for sole purpose of defrauding creditors, where evidence would have supported such finding.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Execution proceeding by Ralph Crofts against W. O. Nicolaides and others, and by the Fox Furnace Company against W. O. Nicolaides and wife, in which David A. Nicolaides and W. O. Nicolaides & Son, Inc., filed third party claims. From a judgment adverse to claimants, they appeal.

Affirmed.

Fred A. Watkins, of San Francisco, for appellants.

Kirkbride & Wilson, of San Mateo, for respondent Fox Furnace Co.

Ernest I. Spiegl, of San Francisco, for respondent Ralph Crofts.

NOURSE, Presiding Justice.

Two third party claims were by stipulation consolidated for hearing held under section 689 of the Code of Civil Procedure, as amended. From an adverse judgment the two claimants have appealed on a joint record. The only question raised on the appeal is the sufficiency of the evidence to support the judgment.

[1] At the outset it should be noted that the Code section eliminates findings of fact, hence, our review is limited by the rule that all presumptions and inferences applicable must go to the support of the judgment.

[2] W. O. Nicolaides and David A. Nicolaides were father and son. The father was engaged in the contracting business, and became insolvent. Two judgments were outstanding against him, upon each of which execution had been returned unsatisfied. He formed a partnership with his son under the name of W. O. Nicolaides & Son. This was done after the execution had been issued on the Crofts' judgment. Thereafter the partnership executed a contract for the construction of a building for a third party payable in installments. A garnishment was issued against the money due the contractor from the owner, but it was released upon payment of a part of the claim, which payment was made by the personal check of the son. Following this transaction, the parties incorporated but continued to conduct the business as individuals, except that a small bank account was opened in the name of the corporation. Thereafter the father executed an assignment to his son of all his interest in the proceeds of the building contract above noted. The executions, which are the basis of the third party claims involved herein, were levied upon the balance due on the building contract, the bank account in the name of the corporation, and the bank account in the name of the son. This corporation and the son are the third party claimants and appellants herein.

No evidence was taken at the hearing upon these claims except that which came from the witnesses produced by the claimants. This evidence is such that the trial court might well have concluded either that no partnership was formed, or that if formed, the parties failed to comply with the statutory requirements, and that the whole plan was merely a scheme to defraud the creditors of the principal debtor. It appears that none of his assets was transferred to the partnership, nor to the corporation; that no consideration was given for the assignment to his son; and that both the partnership fiction and the corporation were mere instruments used by the debtor for the sole purpose of defrauding his creditors.

If the trial court had been required to make findings of fact, ample evidence would have been present to support findings of that character. In support of the judgment we will assume that the court so found.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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25 Cal.App.2d 522

PEOPLE v. DE COE.

Cr. 3051.

District Court of Appeal, Second District, Division 1, California.

March 29, 1938.

1. Criminal law 🔑1159(4)

In prosecution for rape and incest, whether testimony of prosecutrix is inherently improbable is primarily for the jury, and, where the evidence has been fully and fairly presented, a good and sufficient reason must appear before a reviewing court will disturb the verdict.

2. Incest 🔑14
Rape 🔑51(1)

Evidence *held* to justify conviction for rape and incest as against contention that testimony of prosecutrix, who retracted her story several times, was inherently improbable.

3. Criminal law 🔑938(1)

In prosecution for rape and incest, refusal to grant new trial on ground of newly discovered evidence was proper where so-called newly discovered evidence was contradiction of testimony given and merely cumulative.

4. Criminal law ⚿855(1)

On appeal from conviction for rape and incest, judgment would not be disturbed for asserted misconduct of jury based entirely on claim that another trial attracting considerable public attention under way in same building might have influenced jury in determination of issues affecting defendant since contention was mere speculation.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Thomas G. De Coe was convicted of rape and incest, and he appeals.

Affirmed.

Rosalind G. Bates and Carl Yanow, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was found guilty by a jury of two counts each of the crimes of incest and rape, committed against his seventeen year old daughter, appeals from the judgment, and from the order denying his motion for a new trial.

Briefly, it appears from the record that on May 21, and May 28, 1937, after defendant's daughter Delorise, prosecutrix herein, returned home from school in the afternoon, defendant had sexual intercourse with her in the garage in the rear of their home. On June 18, 1937, the prosecutrix went to the police department and reported the matter concerning her father's conduct toward her. The visit to the police followed with the arrest of defendant.

The examining physician at Juvenile Hall made a complete examination of Delorise on June 19, 1937, and "* * * found the hymen was ruptured and relaxed. It was not a recent rupture," and that "this condition would indicate that there had been numerous acts of sexual intercourse."

Delorise testified that she had had previous sexual relations with her father for a period of two years. She further testified that upon the occasions when she had refused to accede to her father's request he would say something like "do this for me and I will do that for you," meaning that he would permit her to "go out." It appears that Delorise had discussed her resentment with her father and had stated that she would tell her mother, but that defendant replied that it would be just her word against his.

On July 3, 1937, before the commencement of trial in the superior court, Delorise, who at that time was living away from home with her grandmother, signed an affidavit which was prepared by her father to the effect that her original story was untrue. On July 17, 1937, Delorise signed another affidavit to the same effect. She testified that her reason for signing the affidavits, which her mother brought to her, was "* * * I felt sorry for my mother and grandmother. * * * And I thought maybe they would be without support, or something, if he (defendant) had to go away." In answer to the question, on redirect examination: "It says in here (the affidavit) that you have never at any time had sexual intercourse with your father. Is that true or untrue?" the prosecutrix replied: "Untrue."

Appellant contends, in substance, that the verdict is contrary to the law and the evidence; that the jury was guilty of misconduct; and that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence.

[1, 2] In connection with appellant's contention first above mentioned, it is argued that the testimony of the prosecutrix is inherently improbable. The observations and comments of appellate courts with regard to the testimony in those cases upon which appellant relies were appropriate and well-founded, but neither those cases, nor, in fact, any other authorities on the same subject, are of any value in determining the question as to whether, as a matter of law, the testimony of the prosecutrix in the instant case is inherently improbable. They merely serve as examples of the law enunciated therein. Under such circumstances each case must, of necessity, stand or fall upon the record of the trial. Primarily such question is for the jury to determine and where the evidence has been fully and fairly presented, it is well established that a good and sufficient reason must appear before an appellate tribunal will disturb the verdict. People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467. Appellate emphasizes, in particular, the fact that the prosecutrix retracted her story in the form of two affidavits, but even this is not conclusive. The witness was examined thoroughly as to her reasons

for executing the affidavits. The jury heard the testimony, saw the witness, and concluded, after hearing all of the evidence both for the prosecution and the defense, that the defendant was nevertheless guilty. Obviously both the jury and the trial judge rejected the so-called "inherent improbability" argument, and the record on appeal presents nothing sufficiently persuasive to justify any other conclusion as a matter of law.

[3] The refusal of the court to grant a new trial on the ground of newly discovered evidence was proper. At most, the so-called "newly discovered evidence," if anything, was just another contradiction and is merely cumulative.

[4] Appellant's contention that the jury was guilty of misconduct is wholly unsupported by the record. Based entirely on the claim that because another trial attracting considerable public attention was under way in the same building and may have influenced the jury in the determination of the issues affecting the defendant and appellant herein, it scarcely warrants judicial attention on appeal. Such contention is mere speculation.

There being no errors in the record, the judgment and order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.

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25 Cal.App.2d 440

PEOPLE v. POLLOCK.

Cr. 3058.

District Court of Appeal, Second District, Division 1, California.

March 22, 1938.

1. Criminal law ⇨935(1), 1159(1)

The jury's verdict is final unless, for legal reasons, it becomes the court's duty to set it aside, and the rule applies to both trial and appellate courts.

2. Rape ⇨51(1)

Evidence *held* sufficient to support conviction of rape.

3. Rape ⇨59(17)

In prosecution for rape, instruction as to resistance was not erroneous, where it was clear and adequate, although brief and not in exact words of previously approved instructions on the subject. Pen.Code, § 261, subds. 3, 4.

4. Rape ⇨43(2)

In prosecution for rape, testimony of physician that immediately after the offense the hymen showed a fresh rupture and was bleeding was admissible, although it indirectly tended to show previous chastity of prosecutrix, evidence of which is inadmissible. Pen.Code, § 261, subds. 3, 4.

5. Criminal law ⇨673(1), 1036(3)

When evidence is admissible for one purpose, it cannot be excluded because it does not satisfy the rules applicable to it in some other respect, and the failure to request an instruction limiting the effect of such evidence forecloses relief on appeal.

6. Criminal law ⇨661

In prosecution for rape, an offer by accused to admit, by stipulation, the act of intercourse, which offer was refused by prosecuting attorney, did not eliminate the issue so as to render inadmissible evidence tending to prove the act. Pen.Code, § 261, subds. 3, 4.

7. District and prosecuting attorneys ⇨8

The district attorney, in connection with the performance of an official act, is not required to accept the judgment of a stranger to the office, except as ordained by law.

8. Criminal law ⇨1137(8)

In prosecution for rape, where prosecuting attorney asked prosecutrix whether she became infected with gonorrhea as a result of attack, although attorney was therein guilty of misconduct, no prejudicial error resulted, in view of cross-examination of prosecutrix wherein she stated she developed gonorrhea and accused made no motion to strike the answer. Pen.Code, § 261, subds. 3, 4.

9. Criminal law ⇨1186(4)

In prosecution for rape, where prosecution sought to impeach accused's character witness by evidence of witness' previous statement to police that accused was "tough," admission of the impeaching evidence did not constitute error affecting substantial rights of accused so as to require reversal. Pen.Code, § 261, subds. 3, 4; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Haven Edwin Pollock was convicted of rape, and he appeals.

Affirmed.

Agins & Allen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant, who was found guilty by a jury of the offense of rape, a felony, appeals from the judgment.

The evidence reveals the following: The prosecutrix was a single woman at the time of the alleged attack; she was 33 years of age, weighed 117 pounds, and was a nurse by occupation. She was living with another nurse in an apartment in Los Angeles, and, in fact, had been in Los Angeles for only 6 months. She first met the defendant, who was a friend of her roommate's boy friend, on August 9, 1937. About a week later, namely on Sunday, August 15th, in the afternoon, defendant and another man who was referred to as "Butch" called upon the prosecutrix at her apartment. After they had stayed awhile, the prosecutrix told them she was going to a dinner party that evening. Defendant, however, persuaded her to accompany them to Glendale, as he was driving "Butch" home; he told her that she would be back at the apartment by 7:30 p. m. It appears that after "Butch" was let out of the car at his destination defendant drove for about fifteen or twenty minutes until he had reached a deserted place in Burbank, off of the road. The prosecutrix was unfamiliar with the territory surrounding Los Angeles. She testified that, "* * * I asked him where we were going and he just kept quiet and I thought we were going towards home." Defendant at that place stopped the car and thereupon proceeded to force his attentions upon the prosecutrix. She struggled and finally succeeded in getting away from the car. Defendant, however, overtook her and completed the attack upon which the alleged offense is based. Police officers subsequently arrived upon the scene.

The physician who examined the prosecutrix at the Burbank Emergency Hospital shortly thereafter testified that she was "in a hysterical state, and she was crying and wringing her hands, * * *" and that he "noticed that her stockings were torn and her knees were abrased as if she had fallen or been on some sharp object, and I noticed that her thighs were skinned with blood on them about two-thirds of the way down to the knees, and I examined the vaginal tract, and I noticed that the hymen, or the maidenhead had been torn and that it was bleeding and blood was still oozing from it. And, on further examination there was blood inside, coming from that wound."

Appellant contends, in substance, that the evidence is insufficient to sustain a conviction of rape with force and violence; that the court failed to instruct the jury properly on the question of the resistance of a female to support the charge of rape; that the introduction into evidence of testimony tending to show that the prosecutrix was of previous chaste character was improperly admitted; that the district attorney was guilty of misconduct in asking the prosecutrix whether the defendant had communicated gonorrhea to her; and that it was error to permit the impeachment of defendant's character witness who had "expressed the personal opinion to the arresting officers that the defendant was 'tough'."

[1, 2] With regard to appellant's contention first above mentioned, namely, that the evidence is insufficient to sustain the conviction, it may be said that in all probability the same argument offered in support of the appeal herein was also addressed to the jury. That question, which was then a question of fact, was decided adversely to the defendant, and the determination thereof by the jury is final unless, for legal reasons, it becomes the court's duty to set it aside. Such rule applies not only to trial courts but to appellate tribunals as well. There is nothing in the record that would justify the conclusion that, as a matter of law, the evidence is insufficient to support the verdict of the jury.

[3] In connection with the claim that the trial court failed to properly instruct the jury on the subject of "resistance," the record reveals that the jury was instructed as to the definition of rape as defined by section 261, subdivisions 3 and 4, of the Penal Code; the jury was further instructed that "force is a necessary element in a crime of rape" and that "the employment of persuasion * * * is not sufficient." The following instruction was also given on the subject of resistance: "The resistance of the female to support a charge of rape

need only be such as to make nonconsent and actual resistance reasonably manifest. The female need resist only until physical penetration occurs, when the crime is complete, and her failure to resist after that is immaterial; and she need only resist until resistance becomes so useless as to warrant its cessation." Appellant urges in particular that the instruction last quoted was insufficient. It may be conceded, in connection with the subject of "necessary resistance," that the trial court did not adopt, in exact words, approved instructions hitherto given on the same subject, but it does not necessarily follow that for this reason the instructions given were insufficient. To the contrary, the instructions on the element of "resistance," although brief, were clear and adequate, from which it cannot be said that the jury suffered any misunderstanding as to the law.

[4-7] Appellant complains about the introduction in evidence of testimony tending to show that the prosecutrix was of previous chaste character. In particular, in this connection, exception is taken to the testimony of the physician who examined the victim immediately following the commission of the alleged offense, and who testified that the hymen showed a fresh rupture which was still bleeding. From such testimony, appellant argues that evidence indirectly tending to prove previous chaste character was received in violation of the rule that previous chastity of the prosecutrix is presumed, and that evidence thereof is inadmissible in advance of an attack thereon. The argument is without merit. The evidence above referred to was clearly relevant and it is well settled that when evidence is admissible for one purpose it cannot be excluded because it does not satisfy the rules applicable to it in some other respect. Under such circumstances, a failure to request an instruction limiting the effect of such evidence forecloses relief on appeal. 10 Cal.Jur. p. 816. It is also urged by appellant that an offer to admit by stipulation the act of intercourse, although refused by the district attorney, nevertheless, eliminated that issue, and hence that all evidence tending to prove the act of sexual intercourse should have been excluded. Appellant's contention in this regard is likewise without merit. The district attorney was not bound to accept defendant's offer. Except as ordained by law, the district attorney, in connection with the performance of an official act, is not required to accept the judgment of a stranger to the office.

[8] The act of the district attorney, in inquiring of the prosecutrix as to whether she became infected with gonorrhea as a result of the alleged attack, was assigned as misconduct, and, at the request of defendant's counsel, the jury was duly admonished. Appellant's claim of prejudice as a result of such asserted misconduct would have some merit were it not for the fact that what was effectively excluded on direct examination was thereafter brought out on cross-examination by defendant's counsel. The questions, and answers of the prosecutrix, on cross-examination follow:

"Q. Did you reach down at any time to get hold of his right hand? A. No, I did not.

"Q. Why didn't you? A. Because I was afraid of an infection, that I might get it in my eyes and get an infection and I did develop gonorrhea."

Thus, to the argumentative question: "Why didn't you?" the prosecutrix replied that she developed gonorrhea. No motion was made to strike the answer, and as a result the evidence remained in the record for the jury's consideration. Appellant, under such circumstances, can scarcely be heard to complain of the inquiry made by the district attorney on the same subject.

[9] Assuming, for the sake of argument, that the effort to impeach one of defendant's character witnesses went beyond the limit of the rule when it was sought to prove that said character witness had stated "that the defendant was tough," nevertheless it does not appear, after an examination of the entire record, that the error complained of could have affected the substantial rights of the defendant or brought about a different verdict than otherwise would have resulted. Under such circumstances, section 4½ of article 6 of the Constitution of California is controlling.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

25 Cal.App.2d 435

MARTIN v. BALLENGER, City Clerk, et al.

Civ. 10639.

District Court of Appeal, First District, Division 1, California.

March 22, 1938.

1. Municipal corporations ⟹97

In absence of governmental regulations to contrary, majority of number of members of city council necessary to constitute quorum, rather than majority of whole number of members present, is sufficient to carry a proposition, and, where there is a quorum present and majority of quorum vote in favor of proposition, it is carried, notwithstanding that equal number refuse or fail to vote. St.1883, p. 93, as amended.

2. Municipal corporations ⟹97

Where members of the governing board of a city who are present at a meeting desire to defeat a measure, they must vote against it, and inaction on their part will not accomplish purpose to defeat measure, but refusal to vote is, in effect, declaration that they consent that majority of the quorum may act for board notwithstanding previous declarations or subsequent protests. St.1883, p. 93, as amended.

3. Municipal corporations ⟹97

The appointment of a councilman for a city of the sixth class to fill a vacancy caused by resignation, which was made on motion at meeting of council at which four members were present and which motion received votes of two of three members necessary to constitute quorum, was legal notwithstanding that other two members of council present at meeting, who failed to vote, expressed opposition to motions. St. 1883, p. 93, as amended.

◆

Appeal from Superior Court, Contra Costa County; A. F. Bray, J.

Mandamus proceeding by L. L. Martin against Wayman Ballenger, Clerk of the City of Concord, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

John L. Garaventa, of Concord, and Tinning & DeLap, of Martinez, for appellants.

Hoey, Hamilton & Turner, of Concord, for respondent

KNIGHT, Justice.

Defendants appeal from a judgment upholding plaintiff's appointment to the office of councilman of the city of Concord, and directing the issuance of a writ of mandate commanding that he be allowed to exercise all of the rights incident to such office.

The question of the legality of the appointment arose out of the following situation: Said municipality operates under the provisions of the general Municipal Corporation Act, St. 1883, p. 93, as amended, as a city of the sixth class. Its government is vested in a council composed of five members, and the president of the council acts as mayor. One of the members resigned, and thereafter, at a regular meeting at which were present the remaining four members, a motion was made by Councilman Eddy and seconded by Councilman Pedrizetti that plaintiff be appointed to fill the vacancy caused by said resignation. The motion was put to a vote and Councilmen Eddy and Pedrizetti voted in the affirmative. The other two, Mayor DeRosa and Councilman Bott, refused to vote, assigning as the reason for such refusal that they thought the selection of the new member should be left to the voters at the next city election. Under the provisions of said Municipal Corporation Act three members of the council constitute a quorum for the transaction of business; therefore, as will be noted, plaintiff's appointment received the affirmative votes of a majority of a quorum. In conformity with said vote the city clerk, a few days later, issued in due form and under the seal of the city plaintiff's certificate of appointment; and plaintiff qualified by taking and filing the oath of office. However, at the next meeting of the council held a month later, it was ordered that the minutes of the previous meeting be corrected so as to show that the city attorney had ruled that plaintiff had not been legally appointed because he had not received "a majority of votes of the members of the Town Council * * * that it took a majority vote of the members of the Council to elect." Thereupon the mayor refused to recognize plaintiff as a member of the council or to allow him to participate as such in the transaction of any of its business. Plaintiff then instituted the present proceeding in mandamus.

[1] On this appeal appellants make no attack upon the legality of the appointment upon the ground previously urged before the council, to wit, that a majority vote of

all members of the council was essential to a valid appointment. Quite to the contrary, they concede it to be the law, as respondents contend, that where there is a quorum present, and a majority of the quorum votes in favor of a proposition, it is carried, notwithstanding an equal number refuse or fail to vote; that in the absence of governmental regulation to the contrary, and here there was none, it is not the majority of the whole number of members present that is required, but only a majority of the number of members necessary to constitute a quorum. 19 R.C.L., p. 890, § 190, and cases cited in note 2; 43 Cor.Jur., p. 510, § 782. But appellants insist that the foregoing rule is subject to the qualification that if the nonvoting members have expressed opposition to the measure to be voted on, it is equivalent to casting negative votes and their votes should be so recorded. Evidently the point thus urged has never been presented to the reviewing courts of this state; and appellants frankly admit that courts of other jurisdictions and text and reference books generally declare adversely to their contention, and that the only cases they have been able to find which they claim support their view are Kozusko v. Garretson, 102 N.J.L. 508, 134 A. 614, 615, and Rhinesmith v. Goodfellow, 111 N.J.L. 604, 169 A. 279, 280, both of which arose in New Jersey.

We are of the opinion that the decision in neither case is here controlling. In the Kozusko Case a governing rule required the majority vote of the entire seven members of the board to carry the resolution then being voted on. One member died, and the remaining six were present at the meeting. Three voted in the affirmative; and three declined to vote, but in so declining they expressed opposition to the resolution. As pointed out by the court in its decision, it had been theretofore held in that state (as in some other jurisdictions) "that the vote of a member present who declined to vote at all should be counted in the affirmative"; and in conformity with such rule the chairman of the board counted the votes of the three nonvoting members in the affirmative and declared the resolution carried. But on the appeal it was held that where a nonvoting member expresses his opposition to the measure to be voted on, such rule should not apply, and that his vote should not be counted in the affirmative. The court then went on to hold that since the resolution actually received only three affirmative votes, or one less than a majority of the whole, it had not carried. In the present case no claim has been made by respondent that the votes of the two nonvoting members should be counted in the affirmative nor in any event were the affirmative votes of either essential to the adoption of the motion because it had already received the requisite majority of a quorum.

But the court in the Kozusko Case, in deciding the main issue, went further and said in effect that where a member expresses opposition to the measure but refuses to vote thereon, his vote should be recorded in the negative; and in the later case of Rhinesmith v. Goodfellow, supra, the dictum of the Kozusko Case seems to have been applied to this extent: Four affirmative votes of the six members of the board were necessary to carry the proposition to be voted on, and the mayor was given the right to cast the deciding vote in case of a tie. Three members voted in the affirmative, and three expressed their dissent but refused to vote; thereupon the mayor, following the dictum of the Kozusko Case, counted the votes of the dissenters in the negative, declared the vote a tie, and cast his vote in the affirmative. On the appeal his action was sustained, the court saying that since the three nonvoting members expressed their dissent, "Their refusal or failure to vote justified recording them in the negative," citing the Kozusko Case.

[2, 3] So far as our attention has been called, no New Jersey case other than the one cited has followed the dictum of the Kozusko Case. But whatever may be the rule in that state, the courts of other jurisdictions have steadfastly adhered to the doctrine that when members of a board present at a meeting, desire to defeat a measure, they must vote against it; that inaction on their part will not accomplish their purpose; and that their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members. Among the authorities so declaring are the following: Willcock on Municipal Corporations, § 546, declaring the common-law rule, and quoted approvingly in 2 McQuillin on Municipal Corporations, 2d Ed., p. 442; 2 Dillon on Municipal Corporations, 5th Ed., p. 851, § 527; 19 Ruling Case Law, p. 890; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N.E. 72, 6 L.R.A. 315, 16 Am.St.Rep. 388;

Bonsack & Pearce v. School Dist. of Marceline, 226 Mo.App. 1238, 49 S.W.2d 1085; Collins v. Janey, 147 Tenn. 477, 249 S.W. 801; Attorney-General v. Shepard, 62 N.H. 383, 13 Am.St.Rep. 576; State ex rel. Walden v. Vanosdal, 131 Ind. 388, 31 N.E. 79, 15 L.R.A. 832; State ex rel. Shinnick v. Green, 37 Ohio St. 227. Nor are the grounds assigned for the refusal to vote material. State ex rel. Shinnick v. Green, supra; State ex rel. Drummond v. Dillon, 125 Ind. 65, 25 N.E. 136, 137; State ex rel. Burdick v. Tyrrell, 158 Wis. 425, 149 N.W. 280, Ann.Cas.1916E, 270; Somers v. City of Bridgeport, 22 A. 1015. As said in the case last cited, the previous declarations of the nonvoting members and their subsequent protest avail nothing. The test is not what was said before or after, but what was done at the time of the voting. Admittedly such has been the prevailing rule for years, and since no reason has been suggested to show that it is illogical or unreasonable, it is, in our opinion, controlling. Therefore, in the present case, if the nonvoting members desired for any reason to defeat the motion which was then properly before the council to be voted upon, it was incumbent on them to vote against it; and having failed so to do, and the motion having received the affirmative votes of a majority of a quorum, the appointment was legal.

Accordingly the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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25 Cal.App.2d 476

INSURED LIFE FUND CO. et al. v. WARD.

Civ. 11761.

District Court of Appeal, Second District, Division 2, California.

March 24, 1938.

Rehearing Denied April 18, 1938.

1. Action 🔑6

In action to determine rights of life policyholder, where it was shown that policy was one issued upon application filed with insurance commissioner in purported compliance with statute for organization of mutual insurance company, but that initial premium had not been paid and that board of directors of insurer did not authorize issuance of policy held by policyholder, or reinsure policy, finding that policy was ineffective was justified. Civ.Code, § 453e.

2. Insurance 🔑141(2)

Where policy was issued upon application filed with insurance commissioner in purported compliance with statute respecting organization of mutual insurance companies but without payment of initial premium, and policy issued was never authorized by board of directors of insurer, though insurer accepted monthly payments of premium until discovering true facts, whereupon policyholder was notified that policy was not considered in force, payment of premiums did not have effect of creating valid policies. Civ.Code, § 453e.

3. Depositions 🔑99

Under statute providing that a deposition of a party may be read in evidence in any other proceeding between the same parties or their privies, deposition of policyholder taken in action against insurer for salaries and damages arising out of transaction surrounding organization of insurer was properly admitted in action by insurer to determine validity of life policy held by policyholder. Code Civ.Proc. § 2022.

4. Depositions 🔑99

Statutory provision respecting admission of depositions, in any action or proceeding between same parties or their privies, does not require that causes of action be the same to make admissible in later action, a deposition taken in an earlier one. Code Civ.Proc. § 2022.

5. Evidence 🔑211

In action to determine validity of life policy, deposition taken in action between policyholder and insurer was admissible, where deposition contained declaration against interest of policyholder. Code Civ. Proc. § 2022.

6. Appeal and error 🔑1043(6)

Admission of a deposition of defendant was not prejudicial, where defendant testified as a witness in the action and his examination was not curtailed in any way. Code Civ.Proc. § 2022.

7. Appeal and error 🔑1071(6)

The failure of trial court to make findings on certain allegations in the pleadings was not prejudicial, where no additional finding that could have been made, would have required a different judgment.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for declaratory relief against holder of life policy by the Insured Life Fund Company, a corporation, and another, against Arthur E. Ward. From the judgment, defendant appeals.

Affirmed.

H. E. Gleason and Lee D. Mathews, both of Los Angeles, for appellant.

Stanley Arndt, of Los Angeles, for respondents.

WOOD, Justice.

Defendant appeals from a judgment rendered in an action for declaratory relief, by which it was adjudged that he was not the holder of an insurance policy claimed to have been issued by one of the plaintiff corporations.

Plaintiff Insured Life Fund Company was originally incorporated in October, 1930, under the name of Providential Assurance Corporation, under the provisions of chapter 6, title 2, part 4, division 1, of the Civil Code, § 453d et seq. as then in force. These or similar provisions have since been included in the Insurance Code. The name of this corporation was later changed to its present title.

Insured Life Fund Company, which will hereinafter be referred to as plaintiff, was organized by defendant Ward with two others, Portman and Holmes. Ward was the owner of certain copyrights in a type of insurance policy and he formed the plaintiff corporation for the purpose of marketing this type of insurance. Another corporation, Assurance Agency, Ltd., was formed by defendant and his associates and was made the general agent to sell the policies to be issued by plaintiff. Assurance Agency, Ltd., then appointed Holmes and Portman as its exclusive sales managers to do the selling. Holmes made an agreement to share his profits on the selling with Ward.

At the time of the organization of plaintiff corporation section 453e of the Civil Code provided in part: "Corporations may be formed to carry on the business of mutual insurance upon the assessment plan, and are subject only to the provisions of this chapter. No such corporation which may be hereafter formed may issue contracts of insurance until at least one thousand persons have applied, in writing, to the insurance commissioner, for membership or insurance therein, and have paid to the treasurer of such corporation the sum of twenty-five thousand dollars." Defendant and his associates interested in the project a number of residents of Santa Barbara, who are referred to in the briefs as the Santa Barbara group. The sum of $25,000 was paid by the Santa Barbara group for stock in Assurance Agency, Ltd., and this sum was in turn deposited with the state treasurer to be held in accordance with the provisions of section 453e of the Civil Code. At some later time this sum of $25,000 was withdrawn from the state treasurer and returned to the Santa Barbara group and in its stead there was deposited with the state treasurer, with the consent of the insurance commissioner, securities of the value of $45,000, which were the property of Angelus Securities Corporation.

In a purported effort to comply with the provisions of the Code above referred to, defendant and his associates determined to sell applications for a certain type of policy known as founders membership certificates. They induced 1004 persons to sign a document entitled "Application for Insurance in the Providential Assurance Corporation, Santa Barbara, California." This document contained the following clause: "It is agreed that there shall be no liability hereunder until a policy has been issued and delivered to me, while in good health, and the first premium thereon actually paid during my lifetime, provided, however, that if said premium is paid in full to the company's agent at the time of making application, then the insurance (subject to the provisions of the policy as issued) shall be effective from the date of approval of this application by the company at its home office." Many of these applications were signed by minors. None of the applicants paid the initial premium on the policies, but, nevertheless, founders membership certificates were given to the 1004 persons who had signed the application blanks. The policy held by defendant Ward was one of the 1004 just referred to. According to the founders membership certificates each policyholder was required, in order to keep his policy in good standing, to pay to the corporation the sum of 50 cents per month and the corporation thereby became liable to pay to the insured a certain sum upon the death of the insured. This sum varied in accordance with the ages of the policyholders. In the case of defendant the fixed amount of the policy was the sum of $120. Concerning these policies the trial court found:

"1,004 pretended applications, including a pretended application of said Ward, were filed with the Insurance Commissioner of the State of California, but said pretended applications were not bona fide applications but were pretended applications designed and used by said Ward, Portmand and Holmes to deceive the Insurance Commissioner of the State of California, and to evade the provisions of section 453e of the Civil Code of the State of California. No initial premium whatsoever has been paid by any of said purported applicants and no part of the said $25,000.00 had been paid to the treasurer of said corporation by said purported applicants or any of them or by said Ward."

[1] At the trial of the action counsel for defendant stated that the only question involved was "whether Mr. Ward has a policy, and if he does, what his rights are." Counsel further stated that no interest in the fund deposited with the state treasurer was claimed except such as could be claimed as a policyholder. The trial court found that defendant was not a policyholder and we are satisfied that this finding is supported by the evidence. Defendant's policy is dated December 1, 1931. It bears the lithograph signature of himself as secretary and also the lithograph signature of the president of the corporation. At a meeting of the board of directors of the corporation held on June 13, 1931, this resolution was passed: "Resolved, that the board of directors of this corporation be and it is hereby authorized, in its discretion, to sell policies or certificates of insurance of this corporation, in such form, for such amounts and to such persons from time to time as shall be determined by the board, and as may be permitted by law." The directors of the corporation decided to secure reinsurance from another company and authorized one of their number to make inquiries of the Great Republic Insurance Company concerning the reinsurance. The minutes of a meeting held before December 1, 1931, show that a motion was passed, "that no policy or contract be issued until definite arrangements had been made in regard to the reinsurance matter." Not until December 15, 1931, was a reinsurance contract executed. Defendant's policy was not reinsured at any time. Defendant was secretary of the corporation and was informed of the various actions of the board of directors. It is manifest from the minutes of the board that the issuance of the policy held by defendant was not authorized.

[2] Defendant points to the fact that the corporation for some time after the issuance of the policy received his monthly dues at the rate of 50 cents per month. Thereafter the corporation refused to receive his dues. The exact amount paid by defendant does not appear from the record, but it is approximately $17. New officers took charge of the corporation and the court found upon sufficient evidence that the corporation on discovering the true facts properly took action to notify defendant that his policy was not considered in force.

[3-6] Defendant contends that the trial court erred in admitting in evidence the deposition of defendant Ward. It appears that the deposition in question was taken in an action between the same parties in which Ward as plaintiff was demanding his salary and damages growing out of the transactions surrounding the organization of the plaintiff corporation. This action had been dismissed. It is provided in section 2022 of the Code of Civil Procedure that a deposition of a party can be read in evidence "in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject." The present action involved the same subject as that involved in the action commenced by defendant even though the relief demanded was different. The code does not require that the causes of action be the same in order to make admissible in a later action a deposition taken in an earlier one. The deposition was also admissible on the ground that it contained declarations against the interest of defendant. Moreover, it is not shown that defendant was prejudiced in any way by the admission of the deposition. Defendant testified in the action as a witness and his examination was not in any way curtailed. The court permitted objections to be made to the various questions propounded at the taking of the deposition. It is not shown that any matter contained in the deposition was improperly admitted.

[7] Defendant contends that the trial court failed to make findings on certain allegations contained in the pleadings. It is manifest that no findings could have been made in addition to those actually made which would call for a different judgment.

The judgment is affirmed.

We concur: **CRAIL, P. J.; McCOMB, J.**

Ex parte SIDEBOTHAM.*

Cr. 1618.

District Court of Appeal, Third District, California.

March 25, 1938.

Hearing Granted by Supreme Court April 21, 1938.

1. Constitutional law ⚷87

The sections of Real Estate Act, requiring owners of lands subdivided into five or more lots to notify state real estate commissioner of intention to sell or lease them, are unconstitutional as imposing on such owners unreasonable burdens precluding their enjoyment of constitutional right to own and control such private property and arbitrarily restricting their free use and right to dispose of their realty. St.1935, pp. 372–375, 1476, 1477, §§ 20a to 20*l*; Const. Cal. art. 1, § 1; Const.U.S. Amend. 14.

2. Constitutional law ⚷81

The sections of Real Estate Act, requiring owners of lands subdivided into five or more lots to notify state real estate commissioner of intention to sell or lease such lots, do not constitute valid exercise of state's police power. St.1935, pp. 372–375, 1476, 1477, §§ 20a to 20*l*.

3. Constitutional law ⚷81

The police power may be exercised only for public health, safety, or general welfare, as distinguished from mere benefit to individuals or classes of persons.

4. Constitutional law ⚷81

The police powers may not be used as cloak to conceal invasion of constitutional rights.

5. Constitutional law ⚷81

It is court's duty to scrutinize carefully legislation enacted in guise of police power so as to keep it within bounds and preserve inalienable rights of individual citizens.

6. Constitutional law ⚷87

Legislation invading individual's right to own and control his own property is unconstitutional and void, though enacted in guise of police power.

7. Habeas corpus ⚷32

One pleading guilty of subdividing land and offering lots for lease and sale without first notifying state real estate commissioner, as required by statute, and not demurring to information or moving to arrest judgment, was not precluded from challenging constitutionality of statute in his habeas corpus proceeding for release from custody under sentence to imprisonment in county jail. St.1935, p. 372, § 20a.

8. Habeas corpus ⚷32

A judgment, sentencing one pleading guilty of violating unconstitutional statute by subdividing land and offering lots for lease and sale without first notifying state real estate commissioner to imprisonment in county jail for one year, was void for want of jurisdiction, so as to entitle him to discharge on writ of habeas corpus. St. 1935, p. 372, § 20a.

◆

Proceeding by Robert H. Sidebotham for a writ of habeas corpus directing his discharge from custody under a sentence to imprisonment in a county jail on his plea of guilty to a charge of subdividing land and offering lots for lease and sale without first notifying state real estate commissioner.

Writ granted, and petitioner discharged.

J. B. Freeman, of Stockton, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and K. I. Jones, Deputy Dist. Atty., of Fairfield, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This petitioner for a writ of habeas corpus pleaded guilty to a charge of subdividing and offering for lease and sale certain land in Solano county without first notifying the state real estate commissioner, contrary to the provisions of section 20a of the Real Estate Act. Stats.1919, p. 1252, as amended by Stats.1935, pp. 366, 372. No demurrer to the information was filed, and no motion in arrest of judgment was presented. The petitioner was sentenced to imprisonment in the county jail of Solano county for the period of one year.

[1, 2] The petitioner contends that the information fails to state facts sufficient to constitute a public offense, and that section 20a et seq. of the Real Estate Act are unconstitutional.

Sections 20a to and including 20*l* were added to, and amended the Real Estate Act in 1935. Stats.1935, pp. 366, 1475. Section 20a reads:

"Prior to the time when subdivided lands shall be offered for sale or lease, the owner, his agent or subdivider shall notify the

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*For subsequent opinion see 85 P.2d 453.

Real Estate Commissioner in writing of his intention to sell such offering. Such notice of intention shall contain the following information: the name and address of the owner; name and address of subdivider; legal description and area of land; a true statement of the condition of the title to the land, particularly including all encumbrances thereon, the terms and conditions on which it is intended to dispose of such land, together with copies of any contracts intended to be used and such other information as the owner, his agent, or subdivider, may desire to present.

"After receiving such a statement the Real Estate Commissioner may require such additional information concerning the project as he may deem necessary, and for which purpose he shall be empowered to prepare a questionnaire for the owner, his agent or subdivider, to answer."

Section 20j defines the word "subdivision," as it is used in section 20a, to mean a division of the land for the purpose of sale or leasing thereof, into five or more lots or parcels.

Sections 20b to 20f, inclusive, provide that the real estate commissioner, in his discretion, may conduct an investigation of the proposed subdivision of land at the exclusive expense of the owner. The commissioner may also require a questionnaire of specified information to be signed by the owner and filed, accompanied with an initial fee of $50. If the land is to be subdivided for purposes other than those of residence or business property, the owner may be required to pay, for the examination referred to, an estimated fee, in addition to the initial $50 fee for filing the questionnaire, of not to exceed $10 per day for the time consumed in the examination. The commissioner is authorized to hold a hearing incident to that proceeding, and to adopt rules and regulations with relation thereto, to determine whether the proposed subdivision of land will result in misrepresentation, deceit, or fraud to the purchasers thereof. After completing the examination, it becomes mandatory on the commissioner to make a public report thereof, and, if it is determined that the plan for subdivision will result in misrepresentation, deceit, or fraud to the purchasers, the commissioner may prohibit the proposed sales or leasings of the parcels of subdivided property.

A violation of any of these provisions of the Real Estate Act is punishable by imprisonment in the county jail for a period of not to exceed two years, or by a fine not exceeding $2,000.

We are impelled to hold that sections 20a to 20*l*, inclusive, of the Real Estate Act, with relation to the subdivision by an owner of land for the purpose of the sale or leasing thereof in five or more separate parcels, are in conflict with the Fourteenth Amendment of the Federal Constitution, and with article 1, section 1, of the Constitution of California, for the reason that they impose onerous and unreasonable burdens on the owners of real property, precluding them from enjoying the constitutional guaranty of owning and controlling such private property. These sections constitute arbitrary restrictions upon the owner's free use and right to dispose of his own real property. They do not constitute a valid exercise of the police power of the state, and they are therefore unconstitutional and void. People v. Pace, 73 Cal.App. 548, 238 P. 1089.

[3] We are unable to see how the restricted use, control and right of an owner to sell or lease his real property enforced by these amended sections of the Real Estate Act can possibly be justified under the police powers of the state. They are evidently not enacted for the general welfare of the public, but rather for the benefit of proposed purchasers or lessees of the property. Police power may be exercised only for public health, safety, or general welfare as distinguished from the mere benefit to be derived by individuals or classes of persons. In Binford v. Boyd, 178 Cal. 458, 461, 174 P. 56, 58, it is said in that regard: "The exercise of the police power is available only for the purpose of promoting the general welfare, the interests of the public as distinguished from those of individuals or persons. It cannot be used to promote private gain or advantage, except so far as the same may also promote the public interest and welfare, and it is the latter, and not the former, effect which forms the basis of the power and warrants its exercise. The Constitution declares that all men are by nature free and independent and have certain inalienable rights among which are those of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. Art. 1, § 1. These rights are invaded if the individual 'is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it.' "

[4, 5] While the exercise of the police power may result in great good for general public welfare, in its uncertain scope and unwarranted exercise there lurks grave danger to the public and to the rights of private citizens. The difficulty which exists in defining its proper limits and in prescribing its bounds affords a temptation to legislative bodies to encroach upon the private rights of citizens to their detriment by hastily enacted laws which may be none the less harmful and dangerous because they may be well intended. It is an established maxim that the police powers may not be used as a cloak to conceal the invasion of constitutional rights. It is the duty of courts to carefully scrutinize legislation enacted in the guise of the police power to keep it within bounds and to preserve the inalienable rights of individual citizens. Binford v. Boyd, supra; In re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664; People v. Holder, 53 Cal.App. 45, 199 P. 832.

[6] The case of People v. Pace, 73 Cal. App. 548, 238 P. 1089, 1092, is determinative of this proceeding. It was there held that that portion of the Corporate Securities Act which prohibited a person from controlling or disposing of his own securities representing an interest in personal property was unconstitutional and void. In that case a rehearing was denied. The principle announced to the effect that legislation in the guise of police power which invades the rights of an individual to own and control his own property is unconstitutional and void has been approved in several subsequent cases. There is no authority to the contrary. We are unable to distinguish the principle there announced from that which is involved in sections 20a et seq. of the Real Estate Act under consideration. Commenting on the cases relied upon in support of the Corporate Securities Act under consideration it is said in the Pace Case:

"The court had under consideration the question of the right of an individual to sell or dispose of his own securities under circumstances such as are involved here, and certainly we have been unable to find any decision wherein a definite declaration is made by the court upon the question here involved. * * *

"We are thus presented with the oft-occurring problem of determining how far legislative enactments shall be permitted to encroach upon the rights of the individual to acquire, possess, and dispose of his property. When the questions of health, morals, or safety are involved, the path for judicial action is clearly defined by a long course of decisions, but when the test is that of 'general welfare,' courts are confronted with many difficult and conflicting considerations, as well as a multitude of diverse judicial decisions. * * * There are well-defined limits as to the extent to which such legislation may go in depriving a natural person of his right to possess property. Nor will the argument of the greatest good to the greatest number, or even the unquestioned beneficial results that might flow from such legislation, avail as against the constitutional guaranty.

"The Corporate Securities Act belongs to that type of legislation sometimes referred to as the 'paternal activity' of government. It is an attempt to throw about the individual who is about to invest his money in certain kinds of property a protecting arm of governmental authority. In others words, by regulating and controlling those engaged in the business of selling certain types of personal property, and if need be prohibiting certain undesirable persons or concerns from engaging in that type of business, the law protects those from loss who, either through carelessness or ignorance, might otherwise become the victims of fraudulent design.

"Legislation of this character from the outset has been vigorously assailed, and until the decision in the case of Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann. Cas.1917C, 643, [see, also Rose's U. S. Notes Supp.], judicial opinion was divided on the question of the constitutionality of such legislation. But nowhere in the authorities sustaining the regulation of the business of brokers do we find authority to sustain the contention made here, that the police power under the guise of general welfare may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law. * * *

"The section of the act in question, if sustained, in connection with other provisions of the act, 'does more than regulate' the mode of 'disposing of property.' As we have heretofore pointed out, the corporation commissioner would have the power and it would be his duty to refuse a person a broker's permit if he had a 'bad business reputation,' and by such refusal the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed if such disposition were made in more than one transaction. * * *

"We know of no authority that would sustain the contention that in order to make more effective a worthy regulation, that an invasion of individual rights as guaranteed by the Constitution would be justified. If the regulation of the business of brokers engaged in the sale of securities cannot be enforced in a manner satisfactory to the corporation commissioner without giving him the power to reach out and invade individual rights, then the legislation in question must necessarily fail, in part at least, of the purpose which is sought in this enactment.

"In Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747, Mr. Justice Shaw, in considering the constitutionality of Legislative enactment prohibiting the sale or offering for sale of theater tickets at a price in excess of that originally charged by the theater, makes this comment: 'The constitutional guaranty securing to every person the right of "acquiring, possessing, and protecting property," refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter.' * * *

"The act [Corporate Securities] in part provides for regulation, but also provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act in requiring the filing of certain information in the form of a petition by a person desiring to sell securities is to lay the foundation for action by the corporation commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities.

"In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts, in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L. Ed. 169, [see, also, Rose's U. S. Notes]; Pacific Palisades Ass'n v. City of Huntington Beach et al., 196 Cal. 211, 237 P. 538, 40 A.L.R. 782.

"Appellant further urges that the defendant in this case is denied the equal protection of the law by the section of the act under consideration, in this: That any owner of securities who is not the issuer or underwriter thereof, and who sells for his own account, may do so without hindrance or complying with any provision of the act, provided that he accomplishes the disposal of the securities in one sale or exchange; but when, for any reason, he desires to make a second or a third or a fourth sale, he is by the act deprived of the rights which are accorded to one who desires to make only one sale. As we have pointed out in the outset of this opinion, it is readily apparent that if the act in question is sustained a great many individuals who are the owners of securities which they themselves did not issue or underwrite, would be required to secure a broker's license, which involves the filing of a petition, the awaiting of the decision of the corporation commissioner as to whether or not a broker's license will be issued, the securing and filing of a bond, and perchance eventually the refusal of a broker's license; while other individuals who find it convenient or possible to accomplish the same purpose in making one sale would be relieved from such burdens. It is difficult to believe that the Legislature intended to impose burdens on certain individuals in this manner that would not apply to all persons of the same class, for certainly there is no basis in law for such a distinction. * * *

"Any Legislative enactment that is reasonably subject to the interpretation we have just pointed out manifestly is in conflict with the Fourteenth Amendment to the Constitution of the United States. In 12 Corpus Juris, page 1144, this proposition is thus stated: 'The Amendment (the Fourteenth) was intended to secure equality of right, and it renders unconstitutional all laws which may properly be construed as applying to persons or property arbitrarily and with discrimination, unequally or unjustly.' * * *

"We are of the opinion that the section of the Corporate Securities Act under consideration, so far as it attempts to require a natural person to secure a broker's permit as provided in said act before he may lawfully sell his own securities, where he is not the issuer or underwriter of the same, is unconstitutional and invalid for the reasons herein set forth."

The foregoing conclusion is supported by the cases of Bracey v. Darst, D.C., 218 F. 482, and William R. Compton Co. v. Allen, D.C., 216 F. 537. The two cases last cited hold the provisions of "Blue Sky Laws" in West Virginia and Iowa, which purported to prevent owners of property from controlling or alienating the same, to be void. The constitutional inhibition referred to in the Pace Case applies with equal force to the present case affecting the right of a person to own and control his real property.

[7, 8] The fact that the petitioner pleaded guilty to the charge of violating the provisions of section 20a of the Real Estate Act, without either demurring to the information or moving to arrest the judgment, does not preclude him from challenging the constitutionality of the section on this petition for a writ of habeas corpus. This proceeding does not involve the mere defective allegations of a complaint which attempts to state a criminal charged based on a valid statute. Since the section upon which the information was based is unconstitutional and void, it may not furnish a foundation for any valid criminal charge. Even though the information charge the offense prohibited by section 20a of the Real Estate Act in perfect language, it constitutes no public offense prohibited by any valid statute of the state, or any crime known to the law. Conceding the commission of the acts charged in the pleading, they amounted to no violation of law. Since the section is unconstitutional and void, the court was without jurisdiction to try or sentence the petitioner. The judgment is void. The petitioner is therefore unlawfully restrained of his liberty, and he is entitled to be discharged. Ex parte Maier, 103 Cal. 476, 37 P. 402, 42 Am. St.Rep. 129; Ex parte Keeney, 84 Cal. 304, 24 P. 34; In re Garbarini, 129 Cal. App. 618, 19 P.2d 27; 32 A.L.R. 1054, note.

The writ is granted, and the petitioner is discharged.

We concur: PULLEN, P. J.; PLUMMER, J.

25 Cal.App.2d 517

PEOPLE v. JONES et al.

Cr. 3048.

District Court of Appeal, Second District, Division 1, California.

March 28, 1938.

Hearing Denied by Supreme Court April 25, 1938.

1. Threats 🔑7

Evidence in trial for attempted extortion *held* to show that defendant joined in extortion conspiracy before its frustration, with full knowledge of its purposes and objectives, and performed several overt acts in effort to accomplish such purposes. Pen. Code, § 524.

2. Criminal law 🔑422(6)

One joining extortion conspiracy after its formation by others and actively participating therein adopted other conspirators' previous acts and declarations, so that evidence thereof was admissible against him in his trial for attempted extortion, though there was no direct evidence that he had knowledge thereof. Pen.Code, § 524.

3. Threats 🔑7

Evidence in trial for attempted extortion *held* to show that defendant exhibited alleged court process or warrant of arrest to complaining witness in codefendant's presence for purpose of obtaining money from latter under threat to take him into custody for alleged attempt to commit sodomy unless he paid money then and there, so as to sustain conviction, though defendant did not actually request or receive any money and complaining witness did not understand that he was to give defendant anything. Pen. Code, § 524.

4. Constitutional law ⚷265

The allowance of amendment to information at close of people's case was not error warranting reversal of conviction as violating constitutional provisions making notice and opportunity to be heard essential elements of due process, where defendant, who introduced no evidence, had not rested his case and did not move for continuance nor call to trial court's attention anything showing prejudice to defendant's substantial rights. Pen.Code, § 1008; Const.Cal. art. 1, § 13; Const.U.S. Amend. 14.

5. Threats ⚷1(1)

An extortion conspirator, exhibiting fictitious warrant of arrest to intended victim, adopted threats, which he heard fellow conspirator make, as to service of warrant and arrest of such victim unless he paid money demanded, so as to justify conviction of former conspirator, for attempted extortion, though he made no verbal threat to accuse victim of felony or cause unlawful injury to his person. Pen.Code, § 524.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Edward Jones and Fred Cabaney, also known as Ralph Graves, were charged with an offense, and second named defendant was convicted of attempted extortion, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

The defendant and appellant was convicted of one count of attempted extortion (violation of section 524 of the Pen.Code). He was tried by the court without a jury, and he appeals from the judgment, and attempts to appeal from the sentence. As there is no appeal from the sentence, that portion of the appeal is dismissed.

The appellant and one Edward Jones were accused by information filed in the superior court with attempted extortion, in that it is alleged that they attempted to extort the sum of $250 from one William J. Hayman on or about July 30, 1937. The original information was amended at the close of the People's case by adding the words, "and would then and there and thereafter do an unlawful injury to the person of said William J. Hayman by arresting and causing the arrest of said William J. Hayman upon a charge of felony." This is alleged by appellant to have been an amendment made at the close of the trial. This statement is made by reason of the fact that the appellant offered no evidence; and, although the amendment was made immediately upon the close of the People's case, the appellant did not ask for any continuance, and does not show any prejudice or surprise by reason of the amendment being made at the time it was made. Such amendment was made to conform to the proof that had been theretofore introduced.

[1-3] One principal objection of appellant, urged particularly in his closing brief, is that the court erred in permitting the introduction of evidence of all the surrounding circumstances leading up to and preceding the act committed by the appellant. The record discloses that the appellant was acting with several other persons, as the result of a transaction which was started by others, but into which transaction and conspiracy the appellant later entered. The case was tried upon the theory of a conspiracy, the establishment of which was amply supported by the testimony of complainant and the admissions of the appellant in a conversation recorded by dictaphone. The transcript discloses that on several occasions when appellant and his codefendant, Jones, were in the presence of the alleged victim, Hayman, appellant showed a badge, declared he was a detective, exhibited and presented to the complainant a fictitious warrant of arrest in which the latter was charged with the offense of sodomy, in connection with which bail was fixed in the sum of $2,500. The record also discloses that there was presented to the jury testimony that appellant said to complainant, Hayman, at the time the former produced what appeared to the latter to be a warrant or summons, "You are under arrest." The transcript also discloses the fact that appellant, in the presence of his codefendant, Jones, told the complainant that the latter would have to raise $2,500 to effect his release. The foregoing, together with other testimony in the record, overwhelmingly establishes the fact that this appellant joined

a conspiracy prior to its frustration and with full knowledge of its purposes and objectives, and performed several overt acts in an effort to accomplish the purposes of the unlawful combine. Therefore, having joined the conspiracy after it was formed, and having actively participated in it, appellant thereby adopted the previous acts and declarations of his fellow conspirators, and evidence of such acts and declarations was admissible against him, even though there was no direct evidence that he had any knowledge thereof. People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718; People v. Schmidt, 33 Cal.App. 426, 443, 165 P. 555. Although the appellant himself did not make any actual request for money, the reason for his so showing or handing the alleged court process to the complainant was shown by what was said at the time and place of such exhibition of the so-called court process. It was stipulated that there was no valid warrant or court process in existence at the time that the appellant took part in this attempted extortion. There was a request made in his presence for a bond of $3,000. Although the appellant's brief contains the statement that the money was to be put up in court, and the complainant did not understand that he was to give the appellant anything and at no time did the appellant receive any money, yet all the facts and circumstances surrounding the transaction complained of showed that the alleged court process or warrant was exhibited with the purpose of obtaining money from the complainant under threat that if he did not pay money then and there that he would be taken into custody for an alleged attempted act of sodomy. Money had theretofore been received by the codefendant of appellant, which codefendant has heretofore pleaded guilty, but this was a separate and different attempt to secure other and different moneys under a sham statement that it was to be put up in court as a cash bond by the complainant, and was to be delivered by either the appellant or his codefendant, Jones.

There is no evidence before this court from which the court can draw the conclusion that all the things testified to which are denominated by the appellant as acts of coconspirators prior to but interrelated to the offense charged were not fully known to the appellant; in fact, there is evidence that he was aware of the only portion thereof that could in any way prejudice him with the trial judge. A slightly different and more technical ruling might be possibly laid down in the case of a trial with a jury. As a matter of fact, there was evidence in the record that showed that the evidence complained of was disclosed to the appellant and was the reason why the appellant undertook the commission of the crime charged herein.

[4] The objection made by appellant that the amendment allowed by the court hereinbefore referred to "was in violation of article 1, section 13, of the Constitution of the State of California, and the fourteenth amendment to the Constitution of the United States, in its due process clause, requiring notice and an opportunity to be heard as the essential elements of due process of law," is evidently based upon the objection urged that the "pleading was amended at the close of the trial." Section 1008 of the Penal Code permits amendments of indictments or informations, with permission of the court, at any stage of the proceedings "unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted." As we have heretofore pointed out, this amendment was allowed at the close of the People's case. No motion was made for a continuance, and nothing was called to the court's attention at that time to show that by the making of such an amendment the substantial rights, or any rights, of the appellant, were prejudiced. The appellant's failure to introduce any evidence is probably the only excuse that he is now able to make for his statement that the amendment was made after the close of the trial, but at the time the amendment was ordered the defendant had not rested his case and neither the presentation of the evidence nor the trial was ended. We can see no violation of any of the substantial or constitutional rights of the appellant by the allowance of this amendment. No attempt is made by appellant's briefs to show in what way any of his substantial rights were even affected by the allowance of the amendment at the time it was made.

[5] The argument that there was no verbal threat made by appellant to accuse the complainant of a felony or a verbal threat to cause unlawful injury to his person is not material here, as there was a complete and positive threat expressed by the actions and conduct of the appellant and by his exhibition of the fictitious warrant, taken together with the conversation be-

tween complainant and the other defendant in this matter, who has heretofore pleaded guilty, which conversation took place in the presence and in the hearing of all three of them. The actions of appellant were interrelated to and constituted an adoption of the verbal threats made by the codefendant of appellant at the time the fictitious warrant was exhibited. It was an adoption by appellant of whatever threats he heard the other make in reference to the service of this warrant and the taking of complainant into custody if the latter did not put up the cash requested.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

25 Cal.App.2d 497

WILLIAMSON v. PAYNE, County Auditor, et al.

Civ. 5997.

District Court of Appeal, Third District, California.

March 25, 1938.

Hearing Denied by Supreme Court May 23, 1938.

1. Taxation 🔑480

A rule of Los Angeles county board of equalization requiring attendance of property owners at hearing of application for reduction of assessment was reasonable as designed to enable board to obtain firsthand information from which an exact appraisement and levy could be made. Pol.Code, §§ 4041, 4041.1; Const. art. 13, § 9.

2. Taxation 🔑466

A county board of equalization can adopt rules which will enable board to obtain firsthand information without being overrun by agents or persons who engage in practice of working up a clientele having for its object a reduction of assessments for a percentage of the amount of taxes paid to the owner. Pol.Code, §§ 4041, 4041.1; Const. art. 13, § 9.

3. Taxation 🔑466

Under Constitution, Los Angeles county board of equalization has authority to adopt rules and regulations for government of board. Const. art. 13, § 9.

4. Taxation 🔑480

A statute requiring board of equalization to examine property owner or his agent before reducing assessment did not confer any right, privilege, or immunity on owner or restrict board's power as to whether owner or agent would be examined, but gave board the right to examine either owner or agent. Pol.Code, § 3675.

5. Taxation 🔑466

A statute requiring board of equalization to examine property owner or his agent before reducing assessment did not prohibit board from adopting rule requiring owner to be present if within the county and able to attend, or limit the right of the owner to be heard. Pol.Code, § 3675.

6. Taxation 🔑480

A rule of Los Angeles county board of equalization requiring property owner to be present at hearing of application for reduction of assessment if within the county and able to attend was in aid of statute requiring board of equalization to examine property owner or his agent before reducing assessment, and was not in derogation thereof. Pol.Code, § 3675.

7. Taxation 🔑482(2)

Informality in giving notice that property owner must attend board of equalization hearing of application for reduction of assessment as required by rule of board will not affect validity of assessment. Pol.Code, §§ 3673, 3675, 3885, 4041, 4041.1.

8. Taxation 🔑466

A county board of equalization has the right to make rules for the government of its business, whether board is a quasi-judicial body or a ministerial body. Pol.Code, §§ 4041, 4041.1; Const. art. 13, § 9.

9. Taxation 🔑466

That county board of equalization and county board of supervisors are distinct identities does not limit reasonable rule making power of board of equalization. Pol. Code, §§ 3673, 4041, 4041.1; Const. art. 13, § 9.

10. Taxation 🔑466

A rule of Los Angeles county board of equalization requiring attendance of property owners at hearing of application for reduction of assessment if within county and able to attend was not invalid as violating statute requiring board of equalization to examine property owner or his agent before reducing assessment. Pol.Code, § 3675.

11. Taxation ⚿500

A property owner whose agent was not permitted to appear before Los Angeles county board of equalization in owner's behalf until owner should appear personally was not denied a hearing, and hence could not set aside assessment on that ground, where owner was present in county and able to attend board's hearing for reduction of assessment as required by rule of board but did not do so. Pol.Code, §§ 3674, 3675.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by William Roy Williamson against H. A. Payne, Auditor of the County of Los Angeles, and others, for cancellation of an assessment levied on property belonging to the plaintiff. From a judgment for the plaintiff, the defendants appeal.

Reversed.

Everett W. Mattoon and Gordon Boller, both of Los Angeles, for appellants.

A. Moresby White, of Hollywood, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment ordering and decreeing the cancellation of a certain assessment levied on property belonging to the plaintiff for the fiscal year 1935–1936. From this judgment the defendants appeal.

The allegations of the complaint are to the effect that the assessment referred to was illegal, discriminatory, confiscatory, and fraudulent, and that the plaintiff was denied the right of appearing before the board of equalization to give testimony as to the value of the property assessed, and the reasons why the assessment should be reduced.

The record shows that the county board of equalization of the county of Los Angeles adopted rules governing the procedure of the board sitting as a board of equalization, one of the rules being to the effect that no reduction in the assessment of any property would be ordered unless the owner of the property, if in the county and able to attend, attended before the board of equalization at the time appointed for the hearing of his application for a reduction of the assessment.

The court held that this rule was in violation of the provisions of section 3675 of the Political Code, and therefore void, and the assessment involved in this action consequently invalid.

While the briefs in this case have taken a rather wide range, there are really but two questions involved, to wit:

First. The validity of the rule adopted by the board of equalization requiring the presence of the owner of the property, if within the county and able to attend;

Second. Was the plaintiff in this case actually denied a hearing?

The record shows that on or about the 9th day of July, 1935, an application was made and filed pursuant to section 3674, supra, praying for the reduction of the assessment upon certain properties therein mentioned. The application is in the words and figures following, to wit:

"92———Supervisorial District No. 805.

"To the Honorable Board of Equalization of the County of Los Angeles, State of California, 1935.

"Your petitioner, William Roy Williamson, respectfully represents that he is the owner of the property hereinafter described and assessed on the assessment roll of the county of Los Angeles, for the year 1935, in the name of same; that the full cash value of said property is as stated below, and your petitioner therefore prays that the valuation on said property be reduced from the amount fixed by the assessor to the amount hereinafter stated as the full cash value of said property.

"Excessive, unequal, disproportionate and/or double assessment, as set forth in the affidavit and brief attached hereto and made a part hereof.

"Wherefore, your petitioner prays that reasonable notice of hearing on this application be given, and that the reduction be granted as prayed. Notice of hearing is hereby waived.

"(Sign here)
"William Roy Williamson
"By James O. Stevenson, Agt.

"Address of petitioner: 306 W. 3rd St.

"State of California, County of Los Angeles—ss.:

"James O. Stevenson, Agt. for petitioner, being duly sworn, says: That he is the applicant in the foregoing application, that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

"(Sign here)

"James O. Stevenson.

"Subscribed and sworn to before me this 9 day of July, 1935.

"L. E. Lampton, County Clerk.

"By E. L. Thoring, Deputy Clerk.

"N. B. No action will be taken upon this application unless presented in person by the applicant to the Board of Equalization.

"EXHIBIT 'A'

Petitioner: William Roy Williamson
Assessed to same.
Petitioner's Address: 501 S. Hoover Street.

Petition No. ————

Vol.	Page	M.B. Ref.	Description		Assessed Value	Cash Value	Action Taken
6	187	21 — 39	Tract No. 4081				
			Lot A.	LAND	$13,680.	$3,035.	
(Seal)				IMPS.	4,350.	2,850."	

It will be observed that in connection with this application special attention is called to the fact that no action will be taken upon the application unless presented in person by the applicant to the board of equalization.

The court after finding that the assessment was regularly made, etc., specifically declined to make any finding as to whether the assessment was illegal, discriminatory, confiscatory, or fraudulent, or whether it was made through error of judgment, or as required by law, or in the sound exercise of judgment by the assessor. The court likewise made no finding as to the full cash value or the equalized value of the property involved, nor did it make any finding as to whether the assessment should have been at the contrary figures mentioned in the plaintiff's complaint. The court then adopted the finding challenged herein, designated as finding No. 111, which reads as follows:

"The plaintiff filed written and verified application for reduction of assessment as in paragraph V. of said complaint recited. "Plaintiff's agent signed said application and appeared before the board to give evidence and argument in support thereof. Said board refused to receive said evidence or to hear said agent unless or until his principal, the plaintiff herein, owner of the property, if in the county and able to attend, should likewise be present before said board. Said refusal was pursuant to the rule of said board adopted July 1, 1935, providing as in said complaint alleged that no application for reduction of assessment would be heard if the showing in support thereof at said hearing was made by an agent of the owner, unless said owner was either absent from the county or unable to appear. That said agent was seasonably informed of said rule and of the requirement thereunder, and after receiving such information made reasonable efforts to advise the owner thereof, but after receiving such information was unable to contact the owner prior to the date set for the hearing and the continuances thereof. That plaintiff was not absent from the county or unable to appear before said board at said hearing. Said board was at all times ready and willing to hear said application and the plaintiff's agent in support thereof, and so informed said agent, when he should comply with said rule."

[1] This finding specifically shows that the plaintiff was not absent from the county, or unable to attend before the board at the hearing of his application for a reduction of the assessment. It also shows that the agent of the plaintiff was seasonably informed of the rule of the board and the requirement thereunder that the owner of the property should be present at the hearing of his application. The reasonableness of the rule of the board of equaliza-

tion requires little or no argument to support it. The purpose of adopting the rule is that the board of equalization may have before it the person who is financially interested in the property and in the assessment, and that full inquiry may be made as to the value of the property, its purchase price, if purchased, the extent of the improvements thereon, the cost of the improvements, the annual or monthly income derived therefrom, and such other information as might enable the board of equalization to determine the exact appraisement of the property and the amount of the levy that should be placed thereon.

[2] There is another valid reason, also, for the requirement of the property owners to be present and answer questions touching the assessments and levies made upon their properties. The board of equalization is entitled to first hand information, and likewise is entitled to adopt rules which will enable them to obtain such information without being overrun by agents or persons who engage in the practice of working up a clientele having for the object a reduction of assessments for a percentage of the amount of taxes saved to the owner or owners. In making this statement we do not mean to intimate that anything of this nature appears in the record in this case, but only to show the reasonableness of the rule and the advisability on the part of a board of equalization to make certain of the orderly procedure and conduct of its work in considering different assessments, values of property and equalizing the burdens to be imposed upon owners.

[3] That the board of equalization of the county of Los Angeles had authority to adopt rules and regulations for the government of its body by section 9 of article 13 of the Constitution cannot be reasonably questioned. The portion of that section bearing upon this question reads as follows: "The boards of supervisors of the several counties of the state shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided, such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments."

Section 3673, supra, reads: "The board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower any assessment contained in the assessment-roll of the county or city and county, so as to equalize the assessment of the property in the county or city and county," etc.

[4] Section 3675, supra, to which we have referred, reads: "Before the board grants the application or makes any reduction applied for, it must first examine, on oath, the person or the agent making the application touching the value of the property of such person. No reduction must be made unless such person or the agent making the application attends and answers all questions pertinent to the inquiry." The meaning of this section appears to have been misapprehended. It is in no sense a grant of any right, privilege, or immunity to a property owner. It is, in its language and literal meaning, a restriction only upon the power of the board of equalization to make a reduction without first having, upon oath, examined the owner of the property or an agent. It gives to the board, specifically, the right, and imposes upon the board the duty to examine either the owner or the agent, and does not in any particular restrict the power of the board as to whether the board will examine the owner or the agent. It is entirely optional, we repeat, as to which person the board of equalization will examine. It leaves the board of equalization free to examine the person from whom, in its judgment, it can best obtain direct and trustworthy information as to every factor bearing upon the value of the property, and the reasonableness and fairness of the assessment levied thereon.

[5] We find nothing in section 3675, supra, which is prohibitive in its language or intent, that would restrict the board of supervisors adopting a rule as to the requirements of the owners to be present, if within the county and able to attend to give testimony touching their property. Nor is there anything in the rule which limits the right of the owner to be heard. In fact and in truth it directs that he shall be heard, and gives him notice that the board intends that he shall be heard before taking action upon his application for a reduction of the assessment levied upon his property.

[6-8] Instead of being violative of any of the provisions of section 3675, supra,

the rule of the board is really an aid of the statutory requirement, and not in derogation thereof. The manner of giving notice is not material, and any informality therein does not affect the validity of the assessment. Section 3885, supra, reads: "No assessment or act relating to assessment or collection of taxes is illegal on account of informality," etc. Sections 4041 and 4041.1, supra, empower boards of supervisors to adopt rules and regulations for the government and conduct of their business.

While the appellant presents a rather extensive list of authorities to the effect that a board of supervisors, sitting ex officio as a county board of equalization, is a quasi judicial body under the recent decisions holding that judicial powers are vested only in courts, under the constitutional provision, we think that whether a county board of equalization is a quasi judicial body or only a ministerial or administrative body, the right to make rules of the government of its business is fully authorized by law, and is amply supported by what we have heretofore said.

As an example of some of the rules that have been upheld we may cite the following:

In Rees v. City of Erie, 243 Pa. 189, 90 A. 58, it was held that a board of equalization had the power to pass a resolution requiring that all complaints, protests, etc., should be reduced to writing, and would not be heard orally; that such a rule was a reasonable regulation. The same ruling was had in the case of Pardee v. Schuylkill County et al., 276 Pa. 246, 120 A. 139.

We have heretofore referred to section 4041.1, supra, as to the powers of the board of supervisors to make rules. That section, so far as pertinent here, reads as follows: "Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective counties, shall have the jurisdiction and powers to make and enforce such rules and regulations for the government of their body, the preservation of order [etc.], as may be necessary."

Section 3673, supra, contains the following language: "The board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower any assessment." The board is likewise given power by further provisions of the Political Code to subpoena witnesses.

[9] Other cases might be cited, but what we have set forth herein appears to us to amply support the powers of a board of equalization to make rules and regulations for the government of its business, including the requirement of owners of property to be present at the time their application for reduction of an assessment is being heard. That a board of equalization and a board of county supervisors are distinct identities does not, we think, limit any reasonable rule-making power.

[10, 11] The finding of the court, as we have set forth, shows that the board was at all times willing and ready to hear the application of the plaintiff's agent in support thereof, and so informed said agent when the plaintiff should comply with the rule. It further shows that the plaintiff was not absent from the county, and was not unable to appear before the board, which answers conclusively all the argument of the respondent as to the right of the plaintiff to appear and be heard.

We do not deem it necessary to review a single authority cited by the respondent as to the right of a property owner to a hearing. We think every case cited by the respondent supporting the right of a property owner to be heard states a true and correct rule, but that question is not really in issue in this case, in view of the finding of the court and in view of the owner's failure to appear and avail himself of the opportunity to be heard upon all questions touching the value of his property and the fairness of the assessment levied thereon.

It being apparent that the owner of the property was not denied a hearing or the right to be heard, and the rule in question requiring owners to be present if within the county and able to attend, not involving the impairment of any legal or constitutional right, it necessarily results that the judgment of the court based exclusively upon the theory that the rule of the board of equalization involved herein is void in contravention of section 3675, supra, must be, and the same is hereby reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 506

DE MILLE et al. v. LOS ANGELES COUNTY.

Civ. 5998.

District Court of Appeal, Third District, California.

March 25, 1938.

Hearing Denied by Supreme Court May 23, 1938.

1. Parties 🔑14

Under statute, several plaintiffs can join in an action instead of severally instituting suits to obtain the same relief, where questions of law or fact arise which are common to all such parties. Code Civ.Proc. § 378.

2. Taxation 🔑543(5)

The joinder of several property owners in an action to recover tax money and to have an assessment declared void was authorized, where validity of assessment was attacked on the same ground by each property owner and a declaration as to the law involved would necessarily determine the rights of each property owner, notwithstanding that the question of fact as to the value of the properties and the amount of the assessment that should be levied thereon was different as to each property owner. Code Civ.Proc. § 378.

3. Taxation 🔑543(2), 587

A property owner cannot defeat collection of tax or recover its amount if paid under protest, upon the claim that the assessment was excessive and discriminatory, unless taxpayer has applied for reduction of tax under statute. Pol.Code, § 3674.

4. Taxation 🔑483

Property owners whose petitions for reduction of assessment did not advise board of equalization of facts on which it was claimed reduction should be made, and did not show values of property assessed, or values that should be affixed thereto, and did not contain an offer to pay the taxes that should be found just and equitable, were not entitled to reduction of assessment. Pol. Code, § 3674.

5. Constitutional law 🔑42

Property owners failing to appear at hearing of application for reduction of assessment could not complain that board of equalization rule requiring attendance of property owners at hearing of application for reduction of assessment deprived them of constitutional rights, where they had notice of rule.

6. Taxation 🔑500

A property owner must make an offer to pay such tax as may be found to be equitably and justly due before a court of equity will set aside an assessment of property which is subject to taxation.

7. Taxation 🔑609

Where a tax is partly legal and partly illegal, an injunction will not be granted restraining collection thereof except upon condition that the legal part shall first be paid.

8. Taxation 🔑483

A petition addressed to board of equalization for reduction of assessment against property not exempt from taxation must contain an offer to pay such tax as may be found to be equitably and justly due.

9. Taxation 🔑483

A petition addressed to board of equalization for reduction of assessment must set forth written protest under which tax was paid stating grounds upon which claim of invalidity was founded. Pol.Code, §§ 3674, 3819.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Cecil B. De Mille and others against the County of Los Angeles to recover tax moneys allegedly paid under protest and to have an assessment declared void. From the judgment, the defendant appeals.

Reversed and remanded.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

A. Moresby White, of Hollywood, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs began this action for the purpose of recovering tax moneys alleged to have been paid under protest, and also to have declared void an assessment levied by the County of Los Angeles upon the properties of the respective plaintiffs. The defendant interposed a demurrer to the plaintiffs' complaint, setting forth two grounds:

First. That said complaint did not state sufficient facts to constitute a cause of action as to any of the plaintiffs; and

Second. That there was a misjoinder of parties plaintiff.

The court overruled the defendant's demurrer, and the defendant failing to answer, default and judgment were entered against the defendant for the recovery of moneys alleged to have been paid under protest, and also declaring void the assessment of the taxed properties. From this judgment the defendant appeals.

That the complaint, or, rather, the consolidated complaints, failed to state a cause of action, we think well taken. The demurrer on the ground of misjoinder of parties plaintiff appears to us to be without merit.

[1] Under section 378 of the Code of Civil Procedure as amended in 1927, St. 1927, p. 631, it appears that where questions of law or fact would arise, which are common to all the parties mentioned in the complaint, it is permissible for several plaintiffs to join in an action, instead of severally instituting suits to obtain the same relief.

[2] From an examination of the various counts of the complaint presented for our consideration it is apparent that there is a question of law, or rather, questions of law which are common to all of the parties mentioned as plaintiffs. The validity of the assessment is attacked upon the same ground by every one of the named plaintiffs. A decision as to the law involved in this case necessarily determines the rights of every one of the plaintiffs.

The question of fact as to the value of the properties and the amount of the assessment that should be levied thereon are the only different questions presented for consideration. The rate would be the same as applied to the properties of the different plaintiffs, and the law, as we have said, determining their rights, would be exactly the same. Under the section the trial court is given the power to order separate trials, if in its wisdom it should deem the same necessary. Again, it does not appear that the defendant would be, or could be, disadvantaged in any particular in the trial of the action by reason of the joinder of the plaintiffs in one suit instead of beginning separate actions to obtain a like declaration as to their legal status concerning the alleged illegality of the assessment, which is the vital issue presented by the complaint.

This action is so nearly a companion case with the action of Williamson v. Payne et al., Cal.App., 77 P.2d 900, that we may properly refer to the opinion filed in that case on the 25th day of March, 1938, and adopt the same as to everything therein said as to the power of the board of equalization to adopt the rule challenged in that case. The same rule is challenged here, and in the greater portion of the complaint, made the basis upon which the plaintiffs sought relief. By so doing we may abridge to a considerable extent the length of this opinion.

[3] Section 3674 of the Political Code reads as follows: "No reduction must be made in the valuation of property, unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made." This section provides specifically that there must be a showing of the facts upon which it is claimed the reduction should be made. It seems to be settled law that a property owner cannot defeat the collection of a tax, or recover its amount if paid under protest, upon the claim that the assessment was excessive and discriminatory, unless he has applied for its reduction under this section. Luce v. City of San Diego, 198 Cal. 405, 245 P. 196; Southern California Hardware, etc., Co. v. County of Los Angeles, 49 Cal.App. 712, 194 P. 62; City of Los Angeles v. Glassell, 4 Cal.App. 43, 87 P. 241.

A somewhat similar question to that which we are now considering was presented to the court in the case of Rittersbacher v. Board of Supervisors, 220 Cal. 535, 32 P.2d 135, 137. The court said: "The petitions filed with the board alleged an overvaluation of the described real estate and improvements and nothing more, and the prayer was for an equalization of the value. 'To equalize is to make equal, to cause to correspond, or be like in amount or degree as compared with something.' [Citing authorities.] What the petitioners before the board were entitled to was that their property be placed 'on the same basis of valuation as that applied to other property of like character and similarly situated.' [Citing a number of cases.] * * * The petitioners failed then to advise the board of 'the facts upon which it is claimed such reduction should be made' as required by section 3674 of the Political Code. While mere informalities in the presentation of a petition for equalization should receive a liberal indulgence, nevertheless the above requirement of said section 3674 serves a necessary purpose and should be complied with in order that the board may know, or have some reasonable means of ascertaining, what the claims of the petitioners are, to the end that such claims may be investigated by the assessing authorities prior to the hearing." It was finally held that the petitioners in that case were not entitled to the relief prayed for.

[4-6] In the case at bar, as it appears by what we are about to set forth, the petitions for equalization filed with the board made no reference whatever to the claim of the petitioners that their properties were assessed on an unlawfully discriminatory basis. The petitioners failed to advise the board of the facts upon which it was claimed such reduction should be made.

The complaint or complaints in this action do allege that the assessment of the property was arbitrary in its method, was not equalized with other properties of similar kind, or in any other respect, and was greatly in excess of the full cash value thereof, and was and is the result of a wrongful and illegal system of valuation that is contrary to law and fraudulent, and that it was not an error of judgment. No facts are set forth upon which this language is based, and of course is only the conclusion, in most particulars, of the pleader.

Coming then to what was filed with the board of equalization, we find the following: After alleging the employment of an agent by the name of J. C. Stevenson, the complaints allege that pursuant to said employment the agent, on or about the 6th day of July, 1935, did examine said assessment roll with respect to the taxed properties and other properties of the plaintiff herein, and did file written and verified applications for reduction of such portions of the assessment of the taxed property, and such other property as is shown in schedule A, columns 4, 5, and 6. Turning to schedule A we find the following as to what is alleged to have been filed with the board of equalization:

"List of plaintiffs showing in column (1) the name of plaintiff and complainant; in column (2) the application number given plaintiff's complaint when it was filed with the clerk of the Los Angeles county board of equalization during the board's statutory session of July, 1935; in column (3) the assessment numbers of the protested assessments against the taxed property as shown on the 1935–36 tax bills; in column (4) the assessed valuation of real estate items described on said tax bills; in column (5) the assessed valuation of corresponding improvement items; in column (6) a legend to indicate what part of the assessments were protested in the said complaint.

(1)	(2)	(3)	(4)	(5)	(6)
Cecil B. DeMille	777	(359–948	$610*	$ N	*Protested
		(359–952	770*	N	*Protested
		(359–953	740*	220	*Protested
		(359–954	670*	150	*Protested"

Columns 3, 4, 5, and 6 are extended by the addition of twenty-five more items as to numbers, properties protested, etc., but what we have set forth gives a clear idea of what is alleged to have been filed with the board of equalization.

An examination of Exhibit A as attached to and made a part of the complaint shows conclusively no compliance whatever with the provisions of section 3674, supra.

The complaint further shows that the plaintiffs had notice of the rule of the board of equalization requiring the presence of the owners, and of the opportunity to be heard. Thus, in so far as any of the owners failing to appear, the allegation that they were deprived of any legal or constitutional rights has no support in the pleadings.

There is not a word in any of the complaints showing the values of the property assessed, or the values that should be affixed thereto, nor is there any offer on the part of any of the plaintiffs to pay the taxes that should be found just and equitable, and the amount of taxes that should fairly and equitably be assessed and levied upon any of the respective properties. This, again, is a fatal defect. There is no claim, and cannot be any claim made that the properties involved are exempt from taxation. Being, therefore, subject to taxation, a plaintiff coming into court asking that a judgment be set aside, a court of equity will first require that an offer be made to pay such tax as may be found to be equitably and justly due.

In the case of County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 583, 34 P. 329, this question was presented by way of the deficiency of an answer to allege a defense against an action by the county for the collection of a tax, and related to the exclusion of the evidence by reason of the failure of the answer to plead what we have stated and to make offer of the tax that should be found justly due. This offered evidence was excluded by the court, and the court then added: "It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes (Merrill v. Humphrey, 24 Mich. 170; Lefferts v. Board of Supervisors, 21 Wis. 688; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51); and it is equally true that the fact of such a fraudulent assessment would be available to the taxpayer as an equitable defense in an action brought to enforce the collection of a tax founded upon an assessment of that character. But in appealing to a court of equity for relief by way of injunction against such fraudulent assessment, the plaintiff must show by his complaint that he has paid or tendered the amount of taxes which would have been due from him if his property had been assessed at what he concedes would have been a fair valuation, and he must, in addition, offer to pay what the court shall find to be equitable and just (Merrill v. Humphrey, 21 Mich. 170; State R. R. Tax Cases, 92 U.S. [575] 616 [23 L.Ed. 663]; Huntington v. Palmer [(C.C.) 8 F. 449], 7 Sawy. 355; German National Bank v. Kimball, 103 U.S. 732 [26 L.Ed. 469]; Montgomery v. Sayre, 65 Ala. 564; 1 High on Inj. § 491); and we think the same facts should appear in an answer which seeks to defend against the collection of a tax upon the ground of a fraudulent assessment."

[7, 8] See, also, the recent case of County of Los Angeles v. Ransohoff et al., Cal.App., 74 P.2d 828. Even where a tax is partly legal and partly illegal, an injunction will not be granted except upon condition that the legal part shall first be paid. Mackay v. San Francisco, 113 Cal. 392, at page 402, 45 P. 696. It follows as a necessary conclusion that such an offer must appear in the complaint or complaints to state a cause of action justifying the interposition of a court of equity.

[9] As to a further objection to the sufficiency of the complaint or complaints, our attention is called to the provisions of section 3819 of the Political Code where it provides that a tax paid under protest shall be in writing, and whether the whole assessment is claimed to be void, or if only a part, what portion, and in either case the ground upon which such claim is founded.

The complaint or complaints do set forth under exception E a form used in making protest, but the exhibit as set forth is absolutely blank as to the requirements found in section 3819, supra.

That the protests may have been sufficient is wholly immaterial so far as this court is concerned, for the reason that we are confined to an inspection of the transcript alone, and to the pleadings therein contained.

Other objections are alleged and discussed by the respective parties, but what we have said establishes, we think clearly, that the demurrer interposed by the defendant should have been sustained, giving leave to the plaintiffs to amend within a reasonable time, if so advised, as a cause of action does not, in the plaintiffs, appear to be stated.

The judgment is reversed, and the cause remanded to the trial court to allow the plaintiffs such time as may be reasonable to amend their complaints, if so desired.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 484

GRAY v. GRAY et al.

HADLEY v. SAME.

Civ. 10758.

District Court of Appeal, First District, Division 2, California.

March 25, 1938.

Rehearing Denied April 22, 1938.

1. Election of remedies 🔑10

A guardian who brought law action against ward's sister for money obtained from ward by sister, and recovered judgment therein, was barred by election of remedies from subsequently asserting, by cross-complaint in action by sister's husband to quiet title, a trust against homestead community property of sister and husband on theory that ward's money had been used to satisfy trust deed against such property, notwithstanding allegation that guardian did not know how sister had used ward's money when she brought law action, in absence of showing that guardian was still ignorant of circumstances when she took judgment.

2. Appeal and error ⚷931(4)

On cross-complainant's appeal from adverse judgment predicated on theory that cross-complainant had elected to rely on another action, reviewing court would assume in support of the judgment that trial court inferred from evidence before it that cross-complainant, though ignorant of material circumstances when she instituted other action, did not adopt a different remedy with reasonable dispatch after being informed of material circumstances.

3. Election of remedies ⚷3(4)

A person against whom judgment was obtained and her administrator against whom another remedy was sought on same claim, are not "different persons" within rule that doctrine of election of remedies does not apply where actions against different persons are consistent and concurrent.

4. Election of remedies ⚷14

A cross-complainant who had pursued an inconsistent remedy against a wife did not avoid application of doctrine of election of remedies by joining husband as cross-defendant and claiming existence of trust against community property of husband and wife.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to quiet title by Walker E. Gray, sometimes known as W. E. Gray, against James Gray, as administrator, and others, wherein defendant Julia Hadley, as guardian of the person and estate of Felix Comaskey, an incompetent person, filed cross-complaint. From judgment for plaintiff and against the cross-complainant, the cross-complainant appeals.

Affirmed.

Harold H. Price, of San Francisco, for appellant.

Herbert Chamberlin and Ray M. J. Greene, both of San Francisco, for respondent.

STURTEVANT, Justice.

This is an action to quiet title. The defendants answered the plaintiff's complaint and one of the defendants, Julia Hadley, as guardian of the person and estate of Felix Comaskey, an incompetent person, filed a cross-complaint. That pleading was answered and the trial was had on all of the issues made by the pleadings. The trial court made findings in favor of the plaintiff and against Julia Hadley, the cross-complainant, and from the judgment entered on said findings she has appealed. Although she does not state her position in direct terms, it is apparent that she is claiming that certain findings are not supported by the evidence. The findings so attacked involve the validity of a declaration of homestead filed by the plaintiff and his deceased wife on the piece of real estate described in the complaint. Prior to the year 1910 the plaintiff Walker E. Gray and Mary E. Gray, husband and wife, purchased the property in suit. It was community property. Prior to the month of June, 1932, an incumbrance consisting of a deed of trust stood against the property. The deed of trust was given to secure the payment of a promissory note, the principal of which, then amounted to $6,700 or thereabouts. About the 13th day of June, 1932, Felix Comaskey, a brother of Mary E. Gray, was insane and at that time she induced him to give to her the sum of $10,000. On receipt of said money Mary E. Gray paid off the indebtedness existing on the real estate hereinabove mentioned and the deed of trust was released and discharged. On November 7, 1932, Julia Hadley, having been appointed guardian of Felix Comaskey, an incompetent person, commenced an action against Mary E. Gray to recover the said moneys so paid to her by Felix Comaskey while insane. On the 17th of August, 1934, judgment was entered in favor of said guardian against Mary E. Gray for the sum of $10,000 principal, together with interest from June 13, 1932, and for costs of suit. That judgment was recorded on the 17th day of August, 1934. Immediately prior to the recordation of said judgment the plaintiff and Mary E. Gray filed a declaration of homestead on the said property. The judgment above mentioned has never been appealed from, it has not been paid, and is still in force and effect. On the 27th day of August, 1934, Mary E. Gray died and thereafter James Gray was appointed administrator of her estate. Soon after his appointment Walker E. Gray commenced this action against James Gray, as the said administrator, and also against Julia Hadley, as the said guardian. A short time after the appointment of the administrator, Julia Hadley, as said guardian, presented her claim against the said estate. In form it was a claim solely for money based on the judgment recorded August 17, 1934. In framing her cross-complaint the said guardian pleaded the foregoing facts and asked for a decree impressing a trust on the moneys paid to Mary E. Gray by Felix Comaskey and to have a lien declared against the real estate in suit.

The trial court made specific findings that the judgment in favor of Julia Hadley could not be enforced against the said real estate because of the prior execution and recordation of the declaration of homestead; that, by the commencement and maintenance of the action brought by the cross-complainant against Mary E. Gray, the former "waived and abandoned her rights to again litigate and have adjudicated the same facts, circumstances, and conditions that were heretofore fully and completely adjudicated by a court of competent jurisdiction after a complete and full hearing upon the merits"; that said acts of the cross-complainant constituted an election of remedies; and that the cross-complainant is barred from now maintaining a separate and distinct action seeking to obtain a decree of a court of equity impressing a trust on the said moneys received by Mary E. Gray as aforesaid.

[1, 2] The cross-complainant asserts that a homesead may not legally be declared on trust property. Kemp v. Enemark, 194 Cal. 748, 230 P. 441, and cases there cited. The plaintiff does not claim to the contrary, but he asserts that the record does not present that question. Conceding that at one time the cross-complainant could have made such a contention as she now makes, the plaintiff contends that the cross-complainant elected to maintain an action at law to recover a money judgment. She commenced such an action, she took out an attachment, later the case was tried, and she was awarded a judgment for $10,000, interest and costs of suit. Continuing, the plaintiff further contends that the cross-complainant may not abandon the remedy she had so elected to take and at this time attempt to impress a trust on the property in suit to the extent of the moneys paid by Mary E. Gray on the debt secured by the deed of trust. Hilborn v. Bonney, 28 Cal.App. 789, 154 P. 26. The cross-complainant replies that when she commenced her action to recover a money judgment she did not know that $6,783.31 of the moneys received by Mary E. Gray had been paid on the debt secured by the deed of trust. That reply is insufficient. In her cross-complaint she pleaded the said judgment. She did not plead that she took said judgment in ignorance of the facts just mentioned. No such issue was before the court and there is no finding thereon. However, during the trial of the instant case the uncontradicted evidence disclosed that when the former action was pending the said guardian, on December 20, 1932, took the deposition of Mary E. Gray, and at that time said guardian was informed by the testimony of the deponent as to what payments had been made by her out of the moneys received by her from the ward of the cross-complainant and that she had paid $6,783.31 on the debt secured by the said deed of trust. Notwithstanding such knowledge so acquired, the said guardian pressed said action to trial and on June 25, 1934, obtained the said judgment for money. No appeal was taken, the judgment has not been paid, and it is now in full force and effect. Later, when the instant action was commenced, the said guardian came forward and attempted to plead an affirmative cause of action by a cross-complaint. She pleaded said judgment as a part of her allegations and attempted to base a cause of action thereon sounding in equity.

In Rehfield v. Winters, 62 Or. 299, 125 P. 289, at page 292, Mr. Justice Bean, speaking for the Supreme Court of Oregon, said: "If, in attempting to make an election, one commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his action is not binding. He may, when informed, adopt a different remedy. But if he does not do this with reasonable dispatch, he will be deemed to have waived the right, and his original act will ripen into a bar. [Citing many authorities.]"

As the record before us stands, we must assume in support of the judgment that the trial court inferred from the evidence before it that the cross-complainant, after being informed of the facts regarding the application of payments, did not "with reasonable dispatch" adopt a different remedy.

The identical contention which cross-complainant makes was before the Supreme Court of Washington in Hoskins v. Smith, 133 Wash. 90, 233 P. 279, 43 A.L.R. 175. The court quoted 20 C.J. 35, as stating the rule. Continuing, on page 280 of 233 P., the court said: "Measured by this rule, it is apparent that, at the time the appellant brought his suit for damages, he knew that a fraud had been committed upon him, that the property out of which he claimed he was defrauded had been transferred to an innocent purchaser, and therefore he had two remedies open to him—to impress a trust upon the proceeds of the property wherever found, or to bring an action for damages. Having chosen his action in law for damages, he may not now sue for equitable relief. Appellant contends that 'knowledge of the facts from which his co-existing inconsistent remedial rights arise' means that he must have knowledge of where the money is, or as to what property it has been put into, but we think such is not the meaning of the rule. The homestead being protected by statute from sale under a general judgment, the judgment is affirmed."

[3,4] She also asserts that the doctrine of election of remedies does not apply where the actions are against different persons. She quotes from 20 C.J. p. 8, as follows: "Where actions against different persons are consistent and concurrent, the doctrine of election does not apply and the prosecution of one does not bar the prosecution of the other; and an unsuccessful attempt to recover against one, in the absence of circumstances creating an equitable estoppel, will not bar an action against the other. A party may pursue any number of consistent and concurrent remedies against different persons, until he obtains satisfaction from some of them." We think it is sufficient to say it is clear that within the meaning of said rule Mary E. Gray and her administrator were not different persons; nor, by joining the surviving husband as a cross-defendant, was the instant case brought within the terms of said rule. The cross-complainant must concede those two statements, otherwise she stands before the court attempting to enforce her judgment against those who were not parties to the action in which the judgment was rendered.

The facts before the court in Hilborn v. Bonney, supra, were so closely the same that we think that case is controlling in this case. Frank Bonney, through acts of fraud and deceit, wrongfully induced Grace A. Hilborn to convey to him certain lands. Those lands he sold and with the proceeds he purchased in the name of Ella Bonney, his wife, lot 22, Huston tract in Los Angeles on which he and his wife resided. Grace A. Hilborn sued Frank Bonney and recovered a judgment in damages for his fraudulent acts. In the meantime his wife filed a declaration of homestead on lot 22. Thereafter Grace A. Hilborn commenced an action against Frank Bonney and Ella Bonney to have the homestead set aside and to have her execution declared a lien on the property. The defendants filed a general demurrer. It was overruled. Commencing on page 790 of 28 Cal.App., on page 27 of 154 P., the court said: "The only question involved is the ruling of the court upon the sufficiency of the complaint. The theory of respondent (plaintiff here) is that since, as adjudged in the action wherein she had a judgment for damages against him, the conveyance of her property was obtained by the fraudulent acts of Frank R. Bonney, neither it nor lot 22, bought with the proceeds of the sale thereof, could, as to her judgment, be the subject of a declaration of homestead by the wife; in other words, that by reason of the manner in which the property was obtained, it was impressed with a trust in favor of plaintiff. Conceding, upon the facts stated, plaintiff might have brought an equitable action to impress a trust upon the property or to have a lien declared thereon, and thus have obtained relief, she chose instead to sue at law for a money judgment. Having elected to pursue this course, we are unable to perceive that she has any greater or different rights with reference to the property than any other general judgment creditor of Bonney. The case presented is almost identical with that of Hanly v. Kelly, 62 Cal. 155, wherein it was said: 'Under such circumstances, plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead.' To the same effect is Barker v. Barker, 14 Wis. 131, 142, Fitzell v. Leaky, 72 Cal. 477, 14 P. 198, and Harding v. Atlantic Trust Co., 26 Wash. 536, 67 P. 222. * * * In Fitzell v. Leaky, 72 Cal. 477, 14 P. 198, [supra] the Supreme Court says: 'It (the homestead) is not invalid because made during the progress of litigation, which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such a judgment. The law authorizes a debtor to erect a barrier around the home, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead.'"

We submit the principles decided in that case and the decisions therein cited control the facts presented in the record before us. In view of the conclusions which we have reached it is not necessary to discuss the other points made by the plaintiff.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

DRUMMEY et al. v. STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS et al.*

Civ. 10476.

District Court of Appeal, First District, Division 2, California.

March 21, 1938.

Rehearing Denied April 20, 1938.

Hearing Granted by Supreme Court May 19, 1938.

1. Appeal and error 🔑787
Mandamus 🔑187(8)

Appeal of petitioners in proceeding for writ of mandamus from orders of trial court with respect to petitions for writs of certiorari and prohibition therein was dismissed where expressly abandoned by petitioners.

2. Constitutional law 🔑48

All presumptions are in favor of the constitutionality of an act, all doubts being resolved in favor of and not against its validity, and conflicts with Constitution must appear before statute will be declared invalid.

3. Statutes 🔑47

The statute authorizing suspension of embalmers' licenses for unprofessional conduct consisting of solicitation of human dead bodies by licensee is not unconstitutional as being uncertain, vague, or indefinite in language or purpose of act. St.1933, p. 771, § 15(c).

4. Licenses 🔑38

The purpose of the statute authorizing suspension of embalmers' licenses for unprofessional conduct consisting of solicitation of human dead bodies is not to prevent general advertising but is aimed to prevent direct solicitation of particular dead human bodies by overzealous funeral directors and embalmers in conduct of their business. St.1933, p. 771, § 15.

5. Statutes 🔑47

A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language; mere doubts as to its construction being insufficient to justify disregarding it and mere difficulty in ascertaining its meaning or the mere fact that it is susceptible of different interpretations will not render it nugatory.

6. Licenses 🔑7(1)

Statute authorizing suspension of embalmers' licenses for unprofessional conduct consisting of solicitation of human dead bodies by licensee is not unconstitutional as an arbitrary exercise of power but rather is a reasonable regulation bearing definite relation to public welfare. St.1933, p. 771, § 15.

7. Health 🔑31

The business of both funeral directors and embalmers is subject to regulation under the police power, and Legislature was authorized to provide for protection of public from annoyance and direct solicitation of human dead bodies. St.1933, p. 771, § 15.

8. Constitutional law 🔑287
Licenses 🔑7(1)

Statute authorizing suspension of embalmers' licenses after proper hearing and notice to licensee is not unconstitutional as failing to afford due process. St.1933, p. 771, § 15.

9. Constitutional law 🔑309(1)

"Due process" does not require any particular form or method of procedure but is sufficient if reasonable notice and reasonable opportunity to be heard and present any claim or defense are afforded; due regard being had to nature of the proceeding and character of rights which may be affected by it.

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*For subsequent opinion see 87 P.2d 848.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

10. Constitutional law 🔑287

Revocation of embalmers' licenses after hearing of which one of licensees was notified by personal service, and other by actual notice by receiving copy thereof left at his place of business, both notices being received at date giving reasonable time before hearing at which both licensees actually appeared and were given an opportunity to be heard and present any defense, was not subject to challenge that licensees were not afforded "due process" by the board. St. 1933, p. 771, § 15.

11. Officers 🔑107

Proceedings before administrative boards are not ordinarily governed by technical rules of pleading and practice, but complaint should be sufficient to fully advise on its face what the charge is.

12. Licenses 🔑38

In proceeding for revocation of embalmers' licenses for unauthorized solicitation of business, complaint charging in each of several counts that person charged did on or about specified date, and at specified place, deliver for preparation of burial and for burial of dead body of a named person, such person being then dead, was sufficient to show violation under statute. St.1933, p. 771, § 15.

13. Evidence 🔑211

In proceeding for revocation of embalmers' licenses for unauthorized solicitation of business, testimony given by embalmer on prior investigation relative to prior transactions on which charges were based was admissible as evidence of admissions to material facts. St.1933, p. 771, § 15.

14. Evidence 🔑241(1)

In proceeding for revocation of embalmers' licenses for unauthorized solicitation of business, evidence given by embalmer on prior investigation relating to transaction on which charges were based was incompetent as to funeral director by whom embalmer was employed, who was not party to prior investigation, or present at any time during its progress, notwithstanding that embalmer may have been employee, or agent of funeral director. St.1933, p. 771, § 15.

15. Evidence 🔑241(1)

Ordinarily, admissions of agent or employee are incompetent evidence against principal or employer.

16. Licenses 🔑38

Evidence *held* insufficient to sustain findings and decision of board suspending funeral directors' license for unauthorized solicitation of business. St.1933, p. 771, § 15.

17. Mandamus 🔑87

A writ of mandamus should issue to reverse decision of the Board of Funeral Directors and Embalmers suspending licenses of funeral director and embalmers only on showing of abuse of discretion by board. St. 1933, p. 771, § 15.

18. Mandamus 🔑87

A writ of mandamus requiring State Board of Funeral Directors and Embalmers to dismiss proceedings against embalmer for unauthorized solicitation of business and to reinstate embalmer to use and enjoyment of embalmers' license which had been revoked by board was improperly granted where record of proceedings before board on which mandamus proceeding was submitted showed that evidence was sufficient to justify suspension of license, and that suspension of license was not abuse of discretion. St.1933, p. 771, § 15.

19. Licenses 🔑38

The suspension of the license of a funeral director by State Board of Funeral Directors and Embalmers in proceeding wherein only evidence on which action of board was predicated was incompetent as to funeral director constituted an abuse of discretion. St.1933, p. 771, § 15.

20. Mandamus 🔑87

A writ of mandamus was properly awarded to require State Board of Funeral Directors and Embalmers to dismiss proceedings against funeral director for unauthorized solicitation of business, and to reinstate license of funeral director, where record of proceedings before board on which mandamus proceeding was submitted showed abuse of discretion in that action of board was based solely upon evidence which was incompetent as to funeral director. St.1933, p. 771, § 15.

21. Certiorari 🔑21
Constitutional law 🔑80(2)
Prohibition 🔑6(1)

In absence of constitutional authority, Legislature may not confer judicial power upon statutory administrative boards exercising state-wide jurisdiction, and hence neither writ of review nor writ of prohibition is available as remedy with respect to proceedings of such board.

22. Constitutional law ⟹80(2)

The Legislature may confer quasi judicial functions on administrative boards exercising a state-wide jurisdiction.

23. Licenses ⟹21

As respects scope of judicial review, the statute providing for the making of decisions by the State Board of Funeral Directors and Embalmers in the general nature of judicial decision after hearing on notice confers "quasi judicial" functions on board with power to make "administrative determination" in exercise of discretionary administrative functions. St.1933, p. 771, § 15.

> The term "quasi judicial" is a term designating an act or proceeding of or before an administrative tribunal or official of the general nature of the judicial act, but not within the judicial power as defined under Constitution.
>
> [Ed. Note.—For other definitions of "Administrative" and "Quasi Judicial," see Words & Phrases.]

24. Mandamus ⟹70, 72

The appropriate remedy with respect to a decision of State Board of Funeral Directors and Embalmers is proceeding in mandamus, whether functions exercised by board are termed "quasi judicial" or "discretionary administrative functions," such terms being practically synonymous as applied to powers and functions conferred on board. St.1933, p. 771, § 15.

25. Mandamus ⟹172

In mandamus proceeding to compel administrative board to act in certain manner, or to attack decision previously made by such board, all questions of fact are determined by court without regard to previous determination of fact by board or officer, where board or officer exercises purely ministerial powers and functions.

26. Mandamus ⟹172

In mandamus proceeding to compel administrative board or officer to act in certain manner, or to attack decision previously made by such board or officer, sole issue to be determined by court is whether board or officer abused discretion conferred, where board or officer exercises discretionary powers and functions, and is authorized to decide questions of fact and reach decisions after hearing on notice.

27. Mandamus ⟹172

Under statute conferring on board of embalmers and funeral directors power to hold hearings on notice, hear and weigh evidence, and make decisions in accordance with facts as found by it, findings and decisions of board were final and open to attack in mandamus proceeding only on showing of abuse of discretion; the powers conferred on board being "quasi judicial functions" rather than merely "ministerial functions," as against contention that petitioners were entitled to trial de novo on all fact questions and substitution of discretion of court for discretion of board. St.1933, p. 771, § 15.

28. Mandamus ⟹87

In mandamus proceeding to attack decision of administrative board exercising discretionary powers and functions, abuse of discretion is sufficiently shown where it is made to appear that board made findings and decision with respect to petitioner without any competent evidence as to petitioner to sustain findings and decisions.

29. Mandamus ⟹72

The remedy afforded in a mandamus proceeding directed at a board exercising discretionary powers and functions is at least as extensive as that previously afforded in a certiorari proceeding.

30. Mandamus ⟹15

In mandamus proceeding to compel board of funeral directors and embalmers to dismiss proceeding against funeral director in which funeral director's license was revoked, failure of funeral director to object to admission of incompetent evidence in proceeding before board did not affect power of court to annul decision of board for abuse of discretion because predicated on incompetent evidence; the proceeding before the board not being a "judicial proceeding" and the decision of the board not being a "judgment of a judicial tribunal," since board was essentially an administrative board, decision of which did not have attributes of judgment, although proceeding might be termed a "quasi judicial proceeding." St. 1933, p. 771, § 15.

> [Ed. Note.—For other definitions of "Judicial Proceeding," see Words & Phrases.]

31. Appeal and error ⚷204(1)

In judicial proceeding, failure to enter objections to competency of evidence on trial precludes raising of such objection on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Mandamus proceeding by William P. Drummey and others against the State Board of Funeral Directors and Embalmers and others. From orders with respect to their petitions for a writ of certiorari and writ of prohibition, the petitioners appeal, and, from a judgment ordering that a peremptory writ of mandamus issue, the respondents appeal.

Appeal of petitioners dismissed, and judgment ordering that writ of mandamus issue affirmed in part and reversed in part.

Prior opinion, 71 P.2d 834.

Frank J. Barry, of Los Angeles, for appellants.

Bianchi & Hyman and A. B. Bianchi, all of San Francisco, and Tinning & De Lap, of Martinez, for respondents.

George A. Martinelli, Morettini & O'Neill, Randall O'Neill, and D. T. Jenkins, all of San Jose, amici curiae.

SPENCE, Justice.

[1] This is an appeal by the State Board of Funeral Directors and Embalmers and the members thereof from a judgment of the trial court ordering that a peremptory writ of mandamus issue commanding said board to dismiss certain proceedings against petitioners and to admit petitioners to the use and enjoyment of their respective licenses. Another appeal was taken by petitioners from certain orders of the trial court with respect to their petitions for a writ of certiorari and a writ of prohibition. The appeal of petitioners may be dismissed, as they have expressly abandoned said appeal. For the sake of clarity and brevity we will refer to parties as the petitioners and the board throughout this discussion.

Petitioner William P. Drummey was a duly licensed embalmer. Petitioner Aubrey Wilson was a duly licensed funeral director doing business under the name of Wilson & Kratzer. Petitioner Aubrey Wilson was also a duly licensed embalmer. Their licenses had been issued under the provisions of the Funeral Directors and Embalmers Law. Deering's Gen.Laws 1931, Act 2318, as amended. Three separate complaints were filed with the board charging petitioners with unprofessional conduct as defined in said act and praying for the suspension or revocation of their respective licenses. Each complaint contained several counts in which the unprofessional conduct was alleged to consist of solicitation under section 15 of said act, as amended by St.1933, p. 771. Said section provides in part: "The board shall also have the power to suspend or revoke licenses after proper hearing and notice to the licensee, upon such licensee being found guilty of any of the following acts or omissions: * * * 2. Unprofessional conduct which is hereby defined to include: * * * (c) Solicitation of human dead bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; provided, this shall not be deemed to prohibit general advertising." After notice to petitioners, a hearing was had on all three complaints. Petitioners appeared at the hearing and, while they were not represented by counsel, they were apprised of their right to be so represented. They expressed no desire to exercise that right but proceeded to act for themselves and to cross-examine the witnessses. At the conclusion of the hearing, they were found guilty of several of the counts set forth in the respective complaints. An order based upon written findings was entered as to each complaint. The embalmer's license of each of petitioners was suspended for one year. The funeral director's license of petitioner Wilson was suspended for one year with a proviso that, after ten days of said suspension, the licensee should be restored to good standing but should be immediately suspended for the remaining portion of the year upon the violation within two years of any of the provisions of the act.

Thereafter petitioner Drummey filed a petition for a writ of review seeking to review the proceedings whereby his embalmer's license was suspended. Petitioner Wilson filed a petition seeking to review the proceedings whereby his embalmer's license and also the funeral director's license of Wilson & Kratzer were suspended. The writs were issued and return was made. During the pendency of the proceedings, the Supreme Court handed down its decision in Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59

P.2d 119. The proceedings having been consolidated for hearing in the trial court, petitioners filed an amendment to their petitions seeking to invoke the remedies of either review, prohibition or mandamus. Demurrers were interposed to the petition as thus amended. The trial court sustained the demurrers to the petitions for writs of review (Standard Oil Co. v. State Board of Equalization, supra) and to the petitions for writs of prohibition (Whitten v. California State Board of Optometry, 8 Cal. 2d 444, 65 P.2d 1296), but overruled the demurrers to the petitions for writs of mandamus and ordered that an alternative writ issue. Upon the subsequent hearing, the matter was submitted upon the record on file and the trial court ordered that a peremptory writ of mandamus issue as above indicated.

As findings were waived and none were made, we must look to the allegations of the petitions and to the points made in petitioners' briefs in an effort to ascertain the theory upon which the trial court ordered the issuance of the writ. In their petitions, the attack was directed both at the act itself and at the proceedings had thereunder. The same attack is made in the briefs on file.

[2-5] With respect to the act, petitioners claim that said subdivision (c) relating to solicitation is unconstitutional. It is contended that (1) it is uncertain, vague, and indefinite as to language and purpose and (2) it is arbitrary and has no reasonable relation to the protection of public health, safety, or welfare. We find no merit in these contentions. We start with the settled rules that all presumptions are in favor of the constitutionality of the act; that all doubts are to be resolved in favor of and not against its validity; and that the conflict with the Constitution must be clear before it will be declared invalid. 5 Cal.Jur. 628, and cases cited. We find nothing uncertain, vague, or indefinite in the language or purpose of the act relating to the solicitation of human dead bodies. The main purpose of the act is expressed in the title which reads in part, "An act regulating funeral directors and embalmers and the transportation of and traffic in human dead bodies." It provides for the licensing of funeral directors and embalmers and for the suspension of such licenses when the licensee is found guilty of unprofessional conduct including the "solicitation of human dead bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; providing that this shall not be deemed to prohibit general advertising." The purpose of this portion of the act is obvious, and the language is sufficiently certain to carry out such purpose. It is not aimed at preventing general advertising, but it is aimed at preventing the direct solicitation of particular dead human bodies by overzealous funeral directors and embalmers in the conduct of their business. It covers the period while death is impending as well as the period after death. Any person of ordinary intelligence may readily ascertain the meaning of said provision, and there appears to be no difficulty in giving the language a reasonable and practical construction. As was said in County of Tulare v. City of Dinuba, 188 Cal. 664, at page 677, 206 P. 983, 988: "A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." See, also, Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217.

[6, 7] Nor do we find anything arbitrary about said provision of the act. On the contrary, it appears to be a reasonable regulation bearing definite relation to the public welfare. The business of both funeral directors and embalmers is subject to regulation under the police power, and we are of the opinion that the Legislature acted within its province in providing for the protection of the public from the annoyance of direct solicitation of the bodies of their loved ones during the time of anxiety and sorrow. Prata Undertaking Co. v. State Board of E. & F. Directing, 55 R.I. 454, 182 A. 808, 104 A.L.R. 389. See, also, People v. Ringe, 197 N.Y. 143, 90 N.E. 451, 27 L.R.A.,N.S., 528, 18 Ann. Cas. 474; State v. Williams, 297 Mo. 607, 250 S.W. 44.

[8, 9] Petitioners further contend that they "were not afforded due process by law or by the board." The first portion of this contention constitutes a further attack upon the constitutionality of the act. But the act provides that a license may be suspended or revoked only "after proper hearing and notice to the licensee." This was suffi-

cient, "for it is well settled that due process does not require any particular form or method of procedure. It is sufficient if reasonable notice and reasonable opportunity to be heard and to present any claim or defense are afforded; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Eley v. Gamble, 4 Cir., 75 F.2d 171, 173. See, also, Enterprise Irr. District v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171; Ramsay v. Shelton, 329 Ill. 432, 160 N.E. 769.

[10] The second portion of said contention relates to the actual proceedings before the board. It appears, however, that petitioner Drummey was personally served with notice and that petitioner Wilson had actual notice by receiving a copy thereof which was left at his place of business. These notices were received at a date which gave notice a reasonable time before the hearing was held and both petitioners actually appeared at the hearing. Both were given the opportunity to be heard and present any defense to the complaints. We are therefore of the opinion that the contention that they were not afforded due process by the board may not be sustained.

[11, 12] Further attacks are made by petitioners upon the proceedings before the board. They contend that the complaint in each instance did not state facts sufficient to show a violation of the act. This contention appears to be likewise without merit. Each complaint contained several counts and in each count it was alleged that the person charged did, on or about a specified date and at a specified place, "solicit for preparation for burial and for burial the dead body of ——— (naming the person), the said ——— (naming the person) being then dead." Conceding the rule that proceedings before administrative boards are not ordinarily governed by technical rules of pleading and practice, petitioners nevertheless state that "it is required that the complaint be sufficient to fully advise on its face what the charge is." Assuming that petitioners correctly state the requirement, it appears that said requirement was met by the complaints here.

The only remaining contention of petitioners is that there was "no competent evidence to support action of board." In treating this contention, we will confine the discussion to the evidence with respect to the so-called Shannon count. We do this for the reason that all parties are agreed that all of the acts alleged in all counts of the complaints, other than the acts alleged in the Shannon count, occurred before the provision in question was written into the statute and cannot be relied upon to sustain the action of the board.

With respect to the last-mentioned contention, it may be noted that it is not claimed that the evidence was insufficient. The record contains ample evidence to show that petitioner Drummey was a licensed embalmer and was also the manager of petitioner Wilson, doing business as a licensed funeral director under the name of Wilson & Kratzer, and that at the time and place mentioned he did, following the death of Ada M. Shannon, solicit for preparation for burial and for burial her dead body. The gist of petitioners' contention is that there was no competent evidence to support the action of the board. It appears that the main evidence offered in support of the Shannon count was the record of a prior investigation held when no charges were pending against either of the petitioners. At that prior investigation, petitioner Drummey was present but petitioner Wilson was not present. Petitioner Drummey was sworn and testified at said prior investigation and gave a detailed account of his dealings with the relatives of Ada M. Shannon following her death. When the hearing was had upon the complaints in question, both petitioners were present. Witnesses were examined on all counts and both petitioners took the stand and testified. The record here shows that the first witness sworn was the shorthand reporter who had transcribed the record of the prior investigation. She identified the transcript of the proceedings on the prior investigation and it was read to the board and introduced in evidence as an exhibit without any objection by either of the petitioners. The evidence given by petitioner Drummey on said prior investigation and so introduced before the board was the only evidence before the board relating to the dealings of petitioners, or either of them, with the relatives of said Ada M. Shannon. As above indicated, it was sufficient, at least if competent, to sustain the findings and action of the board in suspending the embalmer's license of petitioner Drummey and in suspending the funeral director's license of petitioner Wilson on the so-called Shannon count. We need not discuss the question of the sufficiency of said evidence to sustain the findings and action of the board in suspending the embalmer's license of petitioner Wilson. The Shannon count was not included in the complaint seeking the suspension of the embalmer's license of said petitioner, and it was conceded by the board in the trial court, and it is conceded here, that there was no justification for the order of the board suspending said license.

[13-16] Turning to the question of the compentency of said evidence, we are of the opinion that it was competent evidence against petitioner Drummey but that it was incompetent evidence against petitioner Wilson. It is only necessary to state, as to petitioner Drummey, that the testimony given by him on the prior investigation constituted admissions as to material facts. It was therefore competent evidence as to said petitioner on the hearing before the board. People v. Wieger, 100 Cal. 352, 34 P. 826; Shafter v. Richards, 14 Cal. 125. On the other hand, we find no theory upon which said evidence could be held to be competent as to petitioner Wilson. He was not a party to the prior investigation nor was he even present at any time during its progress. Assuming, without deciding, that there was competent evidence before the board to show that petitioner Drummey was the agent or employee of petitioner Wilson, admissions of an agent or employee are ordinarily incompetent evidence against a principal or employer. Hackley v. Southern Pacific Co., 6 Cal.App.2d 611, 45 P.2d 447; Kellner v. Witte, 133 Cal.App. 231, 23 P.2d 1045; Shaver v. United Parcel Service, 90 Cal.App. 764, 266 P. 606; 10 Cal.Jur. 1083, § 322. We find nothing in the record before us to bring the situation within any recognized exception to the general rule. We are therefore constrained to hold that there was no competent evidence before the board to sustain the findings and decision of the board against petitioner Wilson.

[17-20] We now turn to the question of whether the trial court was justified in ordering the writ of mandamus to issue on behalf of said petitioners. In our opinion, it was not justified in ordering said writ to issue with respect to petitioner Drummey, but it was justified in ordering the writ to issue with respect to petitioner Wilson. Under the circumstances before us, the writ of mandamus should issue only upon the showing of an abuse of discretion by the board. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; Cranford v. Jordan, 7 Cal.2d 465, 61 P.2d 45; Bennett v. Brady, 17 Cal.App.2d 114, 61 P.2d 530; Hogan v. Retirement Board, etc., 13 Cal.App.2d 676, 57 P.2d 520; McColgan v. Board of Police Commissioners, 130 Cal.App. 66, 19 P.2d 815; Mogan v. Board of Police Commissioners, 100 Cal.App. 270, 279 P. 1080; Nightingale v. Williams, 70 Cal.App. 424, 233 P. 807. See, also, 16 Cal.Jur. 814, § 31; 18 R.C.L. 125; 2 So.Cal.Law Rev. 87. The mandamus proceeding was submitted to the trial court solely upon the record of the proceedings before the board, which record did not show an abuse of discretion on the part of the board with respect to petitioner Drummey, but did show an abuse of discretion on the part of the board with respect to petitioner Wilson, as the action of the board was based solely upon evidence which was incompetent as to said petitioner Wilson.

These conclusions have been reached after a review of the numerous authorities cited by counsel and particularly those authorities relating to the nature and scope of the proceeding in mandamus. The general subject of the availability and scope of various remedies as applied to the proceedings before various boards and commissions, together with the subject of the finality of the findings and decisions of such boards and commissions, has been the subject of discussion in numerous cases decided in recent years. Many of the authorities are cited in two law review articles. 25 Cal.Law Rev. 694; 25 Cal.Law Rev. 315. We shall not attempt to make an exhaustive review of all of said authorities here. We believe, however, that, owing to the importance of the question involved in the present proceeding and the widely divergent views of able counsel with respect to the effect of certain recent decisions, a further discussion of some of the authorities cited in the briefs is appropriate.

[21-24] It is well settled that, in the absence of constitutional authority, the Legislature may not confer judicial power upon statutory administrative boards exercising statewide jurisdiction, and therefore neither the writ of review nor the writ of prohibition is available as a remedy with respect to the proceedings of such boards. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 1297; Jacobs v. Board

of Dental Examiners, Cal.App., 75 P.2d 96; MacCracken v. Board of Medical Examiners, Cal.App., 74 P.2d 289; O'Donnell v. Board of Medical Examiners, Cal.App., 70 P.2d 246. We believe, however, that the Legislature may confer upon such boards "quasi judicial functions" and that it did so by the statute under consideration which provides for the making of decisions in the general nature of judicial decisions after a hearing held upon notice. The term "quasi judicial" is defined as "Designating an act or proceeding of or before an administrative tribunal or official of the general nature of a judicial act but not within the judicial power as defined under constitutions." Webster's New Standard Dictionary, 2d Ed. Such decisions have been termed "administrative determinations" (Whitten v. California State Board of Optometry, supra), and it has been said that such decisions are made in the exercise of "discretionary administrative functions" (Jacobs v. Board of Dental Examiners, supra). But whether it be said that the board exercises quasi judicial functions or discretionary administrative functions appears immaterial. These terms are practically synonomous as applied to the powers and functions conferred upon the board by the statute before us and either term may be employed without doing violence to the recent decisions which merely hold that such a board does not and cannot exercise judicial power. The appropriate remedy with respect to a decision of such an administrative board is the proceeding in mandamus. This is indicated in Whitten v. California State Board of Optometry, supra, where it is said that the board's "discretion could be confined within legal limits * * * by the use of the writ of mandamus." What then is the nature and scope of the proceeding in mandamus when employed for the purpose of compelling an administrative board to act in a certain manner or, in other words, when employed for the purpose of attacking a decision previously made by such a board?

[25, 26] We are of the opinion that practically all of the authorities on the subject of the nature and scope of the proceeding in mandamus, when employed for the purpose above indicated, may be reconciled when read in the light of the nature of the powers and functions conferred by the particular statute under consideration in each case. It appears that a distinction must be made between those statutes conferring purely ministerial powers and functions and those statutes conferring discretionary powers and functions. It may be difficult in certain cases to determine the type of powers and functions conferred by a particular statute as is illustrated by the discussion in some of the decisions, but the distinction is of importance in determining the scope of a mandamus proceeding when directed at a particular board or officer. When directed at a board or officer exercising purely ministerial powers and functions, all questions of fact are determined by the court in the mandamus proceeding without regard to any previous determination of fact by such board or officer. Sheehan v. Board of Police Commissioners, 197 Cal. 70, 239 P. 844; Sheehan v. Board of Police Commissioners, 47 Cal.App. 29, 190 P. 51; Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874; French v. Cook, 173 Cal. 126, 160 P. 411. But, when directed at a board or officer exercising discretionary powers and functions, and particularly when directed at a board authorized by law to decide questions of fact and to make decisions after a hearing held upon notice, the rule is otherwise and, as shown by the authorities previously cited, the sole issue then to be determined by the court in the mandamus proceeding is whether the board or officer abused the discretion conferred. Compare Mogan v. Board of Police Commissioners, 100 Cal.App. 270, 279 P. 1080 with cases last cited. See, also, Inglin v. Hoppin, 156 Cal. 483, 105 P. 582. The distinction is borne out in Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, at page 35, 190 P. 51, 54, the court quoting from French v. Cook, 173 Cal. 126, 160 P. 411, where it was said: "It is not a board or tribunal by law vested with authority to decide a question, and herein lies the distinction between this case and cases cited in which it was substantially held that the statute was to be construed as submitting the question to the decision of the board or officer."

[27] The statute before us conferred upon the board the power to hold hearings upon notice, to hear and weigh evidence, and to make decisions in accordance with the facts as it found them. In other words, the statute conferred upon the board discretionary powers and functions or quasi judicial functions rather than purely ministerial functions. Under the authorities cited, the findings and decision of the board carried with them a definite degree of finality and were open to attack in the mandamus

proceeding only upon a showing of an abuse of discretion. Petitioners were not entitled, as they contend, to a trial de novo on all questions of fact previously heard and determined by the board, and, when they submitted the mandamus proceeding solely upon the record of the proceedings before the board, the sole question was whether that record showed an abuse of discretion by the board. In other words, they were not entitled to have a redetermination of all issues of fact by the trial court and a substitution of the discretion of the court for the discretion of the board.

Petitioners cite and rely upon Saxton v. Board of Education, 206 Cal. 758, 276 P. 998, but that case is not in point. The statute, Pol. Code, § 1609, subd. 5, as amended by St.1921, p. 1664, there provided: "Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law." It was there held that said provision had the effect of giving the teacher "a trial de novo before the superior court, after a hearing before the board of education." 206 Cal. 758, at page 768, 276 P. 998, 1002. That was a statute, such as is referred to in some of the decisions, providing for a statutory trial de novo. Standard Oil Co. v. State Board of Equalization, supra, 6 Cal.2d 557, at pages 561, 562, 59 P.2d 119; Whitten v. California State Board of Optometry, supra. The statute before us contains no such provision.

[28–31] We need not pause to enumerate the various ways in which an abuse of discretion on the part of a board exercising discretionary powers and functions may be shown in a mandamus proceeding. We are satisfied that, when it is made to appear in the mandamus proceeding that such a board has made its findings and decision with respect to a petitioner without any competent evidence as to said petitioner to sustain said findings and decision, there is a sufficient showing of an abuse of discretion. It has been heretofore held that such a showing required the annulment of a decision of such a board in a proceeding in certiorari. Renwick v. Phillips, 204 Cal. 349, 268 P. 368; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; Messner v. Board of Dental Examiners, 87 Cal.App. 199, 262 P. 58; Osborne v. Baughman, 85 Cal.App. 224, 259 P. 70. Mandamus has been termed the "larger and more fully effective remedy" (Sheehan v. Board of Police Commissioners, 47 Cal.App. 29, 36, 190 P. 51, 54), and we need only hold here that the remedy afforded in a mandamus proceeding, when directed at a board exercising discretionary powers and functions, is at least as extensive as that previously afforded in a certiorari proceeding. It therefore follows that the showing made by petitioner Wilson should be held sufficient to show an abuse of discretion unless his failure to object to said evidence in the proceedings before the board is material on the issue of abuse of discretion. We are of the opinion that his failure to object is not material. In a judicial proceeding, the failure to enter an objection to the competency of the evidence upon the trial precludes the raising of such objection upon an appeal (People v. One Ford, Cal.App., 69 P.2d 473), but the proceeding before the board was not a judicial proceeding and the decision of the board was not the judgment of a judicial tribunal. While said proceeding before the board may be termed a quasi judicial proceeding, the board is essentially an administrative board and its decisions have not the attributes of a judgment of a judicial tribunal. The above-mentioned authorities involving certiorari proceedings make no mention of whether objection was made to the competency of the evidence before the boards in question. Said decisions appear to treat that question as immaterial in certiorari proceedings and we believe it to be immaterial in mandamus proceedings.

By way of summary, we conclude that, as to petitioner Drummey, the record did not show an abuse of discretion by the board and that the judgment of the trial court ordering a writ of mandamus to issue on behalf of said petitioner should be reversed. We further conclude that, as to petitioner Wilson, the record did show an abuse of discretion by the board and that the judgment of the trial court ordering a writ of mandamus to issue on behalf of said petitioner should be affirmed. It further appearing that petitioners have expressly abandoned their appeal from certain orders sustaining demurrers to their petitions for writs of review and writs of prohibition, said appeal should be dismissed.

The appeal of petitioners is dismissed. The portion of the judgment of the trial court ordering that a peremptory writ of mandamus issue commanding the board to dismiss the proceedings against petitioner Drummey and to admit said petitioner to the use and enjoyment of his embalmer's license is reversed. In all other respects said judgment is affirmed. The parties will bear their own costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

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29 Cal.App.2d Supp. 751

PEOPLE v. FABER.

Cr. 91232.

Appellate Department, Superior Court, San Diego County, California.

Feb. 3, 1938.

1. Libel and slander ⇨143

The statute making punishment for criminal slander conditional on existence of malicious intent to injure another operates to make such intent a necessary element of definition of criminal "slander," which is less comprehensive than the formal statutory definition. Pen.Code, § 258.

[Ed. Note.—For other definitions of "Slander," see Words & Phrases.]

2. Criminal law ⇨21

The word "willfully," as used in the criminal law, implies simply purpose or willingness to commit unlawful acts, and does not necessarily imply specific intent to violate law or to injure another. Pen.Code, § 258.

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

3. Criminal law ⇨24

Where specific intent is not part of the definition of a crime, necessary intent is conclusively presumed from the intentional performance of the act denounced, though offender was honestly mistaken as to the meaning of the law.

4. Indictment and information ⇨91(1)

Where specific intent enters into definition of a crime, mere intentional commission of the act denounced is not enough, and hence charge that act was "wilfully" done is insufficient.

5. Libel and slander ⇨152(3)

A complaint, in prosecution for slander, that defendant "did wilfully, unlawfully and maliciously utter certain slander" sufficiently charged the offense with respect to statutory element of "malicious intent to injure another," by using the word "maliciously." Pen.Code, § 258, and § 1426, as amended by St.1931, p. 1656.

6. Criminal law ⇨878(2)

Where each of two counts in complaint charging criminal slander alleged the making of same slanderous statement, but counts differed with respect to identity of person slandered thereby, verdict of "guilty as charged in the complaint" was sufficient, though separate finding on each count would be preferable. Pen.Code, § 954.

7. Criminal law ⇨752½, 1023(3), 1044

Though motion to dismiss slander prosecution for insufficiency of evidence is technically improper and denial of such motion is not appealable, sufficiency of evidence to sustain conviction is raised thereby and is reviewable on appeal from the conviction. Pen.Code, § 1118, and § 1466, as amended by St.1935, p. 2145, § 1.

8. Criminal law ⇨752½, 753(2)

Where evidence is insufficient to sustain conviction, proper motion is to advise jury to acquit and motion to dismiss is not in order. Pen.Code, § 1118.

9. Libel and slander ⇨148

Communications to interested parties and reports of official proceedings at public meetings, unlike communications in discharge of public duty or in official proceedings, are protected by qualified privilege only, and defense of privilege is not available unless publication and surrounding circumstances conform to statutory conditions. Civ.Code, § 47(1-5).

10. Libel and slander ⇨148

The statutory provision that words uttered in discharge of official duty or in official proceedings shall never be deemed a criminal slander contemplates an absolute, not a qualified, privilege, and corresponds to absolute privilege created in cases of civil slander. Pen.Code, § 258; Civ.Code, § 47(1, 2).

11. Libel and slander ⇨148

The scope of qualified privilege for communications to an interested party, with respect to criminal slander, is restricted by construction given to cognate provision of the libel statute that communication is not privileged if false. Pen.Code, §§ 256, 259.

12. Libel and slander 🔑158

Whether slanderous statement concerning chief of police, made by member of city board of trustees to mayor, in order to induce mayor to let such member conduct investigation of police chief, was absolutely privileged with respect to criminal liability as uttered "in the proper discharge of official duty," was for jury. Pen.Code, § 258.

13. Libel and slander 🔑158

Whether slanderous statements concerning chief of police, made by member of city board of trustees to mayor in order to induce mayor to let such member conduct investigation of police chief, was qualifiedly privileged with respect to criminal liability as made "to a person interested therein, by one who is also interested," was for jury. Pen.Code, § 259.

14. Libel and slander 🔑148, 155

Under penal statute providing that slander is presumed to have been malicious unless it is a communication to an interested party, malice may be shown by evidence other than the communication itself, and the privilege consequent merely on absence of malice will disappear. Pen.Code, § 259.

15. Libel and slander 🔑156

Evidence *held* to authorize conviction of member of city board of trustees of slander, for statements concerning chief of police made to mayor and mayor's wife to induce mayor to let such member conduct investigation of police chief. Pen.Code, §§ 258, 259.

16. Libel and slander 🔑158

The constitutional requirement that jury must be permitted to judge both the law and the facts in libel prosecutions is not applicable to slander prosecutions. Pen.Code, §§ 251, 260; Const. art. 1, § 9.

17. Criminal law 🔑815(4)
Libel and slander 🔑159

An instruction in slander prosecution that words uttered in discharge of official duty or communicated to a person interested therein could never be deemed a criminal slander was erroneous as confusing absolute and qualified privilege and ignoring fact that qualified privilege may be discharged by extrinsic proof of malice. Pen.Code, §§ 258, 259.

18. Criminal law 🔑1137(3)

One appealing from conviction of slander could not complain of instruction requested by him which erred on his side.

19. Libel and slander 🔑159

An instruction in slander prosecution that "where a defamatory publication is false it is not privileged" was reversibly erroneous. Pen.Code, §§ 256, 258, 259.

20. Libel and slander 🔑159

An instruction in slander prosecution that absence of malice is an essential element of privilege was erroneous as stating rule inapplicable to absolute privilege which defendant claimed. Pen.Code, §§ 256, 258, 259.

21. Libel and slander 🔑159

A defendant in slander prosecution was entitled to instruction that casual presence of an uninterested party does not necessarily remove statutory privilege attaching to communications to interested persons, rather than to instruction that third party's presence "is not of itself sufficient to remove the privilege." Pen.Code, § 259.

22. Libel and slander 🔑158

In slander prosecution defended on ground of qualified privilege attaching to communications to interested persons, what precautions the presence of uninterested third party would require to prevent abuse and loss of privilege was for jury. Pen. Code, § 259.

Appeal from Municipal Court of City of San Diego.

Michael C. Faber was convicted of slander, and he appeals.

Reversed and remanded.

J. C. Hizar and Sanders & LaMotte, all of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and S. W. Wurfel, Deputy Dist. Atty., both of San Diego, for the People.

HAINES, Presiding Judge.

The defendant, Michael C. Faber, appeals from a judgment of the municipal court of the city of San Diego pronounced against him, after his conviction by a jury in that court of the crime of slander. The complaint was in two counts, of which the first was as follows:

"That said Michael C. Faber on or about the 5th day of July, 1937, in San Diego Township in the said County of San Diego, State of California, and before the making or filing of this complaint did wilfully, unlawfully and maliciously utter certain slander, to-wit: that said defendant did then and there orally state to one J. J. Clausey and to one Mrs. J. J. Clausey in substance as follows: 'I want to show you what the set-up is between Tom Sharp and Ivan Smith. Tom Sharp is the father of Mrs. Smith's baby by her, and Tom Sharp paid Ivan Smith to marry Mrs. Smith so as to keep it quiet'; all of which was and is false and untrue, and was well known by said defendant to be false and untrue; and which statement so made by said defendant as aforesaid then and there tended to impeach the virtue, honesty and reputation of Mrs. Geraldine Smith, a living person."

The second count was identical with the first except that the concluding clause contained the name of Ivan Smith instead of Mrs. Geraldine Smith as the person slandered.

[1] The first question to be considered is whether or not the complaint states any public offense. It is claimed that it does not in that, though it is laid under section 258 of the Penal Code which makes the specific intent to injure another an ingredient of the offense, no such intent is actually charged. That section first defines slander so far as the definition is here applicable as "A malicious defamation orally uttered, * * * tending * * * to impeach the honesty, integrity, virtue or reputation, or disclose the actual or alleged defects of one who is living, * * * and thereby to expose him or it to public hatred, contempt, or ridicule." The section goes on thereafter to declare that "every person who willfully, and with a malicious intent to injure another, utters any slander is punishable," etc. It seems, then, that the requirement that a "malicious intent to injure another" should exist as a part of the act for which the punishment is denounced amounts to making the existence of such specific intent a part of the definition of the crime, although the term "Slander" is, as we just saw, defined in the preceding and independent sentence without the use of the word "intent" nor any word of like meaning unless it be the adjective "malicious." Unless, then, the word "malicious" can in itself be taken to import an intent to injure another, it would necessarily follow that slander generally as defined in the first sentence of section 258 is something more comprehensive than criminal slander as defined in the next sentence of that section.

[2-5] There is, of course, no doubt that "the word 'willfully' as used in the criminal law, implies simply the purpose or willingness to commit the unlawful act." People ex rel. Los Angeles Bar Ass'n v. California Protective Corporation, 76 Cal.App. 354, 363, 244 P. 1089, 1092. It does not necessarily imply any specific intent to violate law or to injure another and, where specific intent is not part of the definition of the crime, such intent as is required to make out the crime is conclusively presumed from the intentional performance of the act denounced though the offender was honestly mistaken as to the meaning of the law. Where specific intent enters into the definition of the crime, however, mere intentional commission of the act denounced is not enough, and therefore it is not enough to charge that it was "wilfully" done. A different question is presented by the allegation that it was "maliciously" done because malice is ordinarily understood as importing bad temper toward another which, combined with the allegation of an overt injurious act, would appear inseparable from an intent to injure another. In People v. Mooney, 127 Cal. 339, 59 P. 761, 762, however, it was holden that under section 447 of the California Penal Code as it then read, defining the crime of arson as the "willful and malicious burning of a building, with intent to destroy it," the specific intent to destroy the building was a part of the definition of arson and, therefore, was an essential ingredient of the offense, and must appear distinctly in the averments of the information, in addition to the averments of willful and malicious burning. The latter words were said to "import only that criminal intent which is a necessary part of every felony or other crime," but it is said that "they do not necessarily include the specific purpose to destroy the building which is an element of the crime of arson." See, also, People v. Nelson, 58 Cal. 104; People v. Smith, 103 Cal. 563, 37 P. 516, and People v. Schiaffino, 73 Cal.App. 357, 238 P. 725.

Counsel for the People have called our attention, on the other hand, to the case of State v. Fosburgh, 32 S.D. 370, 375, 376, 143 N.W. 279, 280, Ann.Cas.1916A, 424, in which a conviction for criminal libel was affirmed. The definitions of libel and of the crime of libel in South Dakota were contained respectively in sections 315 and 316 of the Penal Code of that state, as follows: "§ 315. Any malicious injury to good name, other than by words orally spoken, is libel." "§ 316. Every person who wilfully, and with malicious intent to injure another, publishes any libel, is guilty of a misdemeanor."

It will be seen that there is a close parallel between the manner in which these definitions were framed under the South Dakota libel statute, and manner in which the definitions are laid down in respect to slander in section 258 of the California Penal Code.

It was, however, elsewhere provided in the South Dakota Code of Criminal Procedure, § 228, that: "Words used in a statute to describe a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used."

In these circumstances it was held that an information sufficiently charged the crime of libel where it set forth that the defendant did "then and there unlawfully, willfully and maliciously write and publish of and concerning one John D. Smull, which was intended to and did refer to the said John D. Smull, a certain false, scandalous and malicious libel," and, further, that "said libel was a malicious defamation of the character of the said John D. Smull, tending to provoke him, the said John D. Smull, to wrath, and expose him, the said John D. Smull, to public hatred and ridicule, and to deprive him, the said John D. Smull, of the benefit of public and social intercourse."

In this state, section 1426 of the Penal Code was amended in 1931, St.1931, p. 1656, by adding the following matter: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused."

In our view this enactment brings our statute sufficiently into accord with that of South Dakota to make the reasoning of State v. Fosburgh, supra, applicable to the instant case and to do away with the technicality formerly required by such case as People v. Mooney, supra. We think the use of the word "malicious" in the complaint under review should, in the light of this amendment to the Penal Code, be held to sufficiently import an intent to injure another, and that each count of the present complaint should be held to state a public offense.

Upon the trial it appeared that at the time involved Ivan Smith was chief of police of the city of Coronado and Faber and one Clausey were members of the board of trustees thereof, Clausey having just been made mayor. The board was called upon to consider the propriety of Smith's retention as chief. Faber, in these circumstances, called at Clausey's home and asked the latter, in the presence of Mrs. Clausey, to name him a committee of one to investigate the situation in the police department as it concerned Smith. Clausey demurred and said in effect that, if any one was to conduct the investigation, he would. Thereupon Faber made the assertions set forth in the complaint, after having secured the promise both of Clausey and his wife not to repeat what he was about to say.

The evidence amply established that the assertion made by Faber against the Smiths was wholly untrue; that the child in question was their adopted child; and that neither one of them was its natural parent.

The verdict merely found the appellant "Guilty as charged in the complaint." The municipal court treated the verdict as a conviction of the defendant on both counts and pronounced judgment of fine and imprisonment on both counts, the two terms of imprisonment to run consecutively. It is now claimed on appellant's behalf that it was error for the jury not to have found specifically on each count severally. Section 954 of the Penal Code allows the charging in a complaint of two or more offenses connected together in their commission, or different statements of the same offense or two or more offenses of the same class under separate counts, but goes on to require that "each offense upon which the defendant is convicted must be stated in the verdict." In People v. O'Keefe, 54 Cal.App. 649, 202 P. 476, 477, where two burglaries were charged in separate counts of the same complaint, a verdict finding the defendant "guilty of burglary in the first degree" was held sufficient, the court saying at page 651, of 54 Cal.App., 202 P. 476, 477, that "since evidence was received concerning both charges, and both were submitted to the jury, we think that the verdict in the form in which it was rendered was a verdict of guilty on both counts." That case did not reach the Supreme Court. In People v. Spagnoli, 58 Cal.App. 154, at page 160, 208 P. 185, 186, in which the defendant was charged in violation of a statute with manufacturing "certain intoxicating liquor, to wit, wine and Jackass brandy" apparently in a single count and it appeared that a single process of manufacture produced first a wine and then the brandy referred to, it was said that "the act of defendant really constituted but one offense, although involving the manufacture of two kinds of liquor" and that "it would follow that the jury was not in error in finding a verdict of guilty of the offense charged in the information instead of finding two separate verdicts as required by said section 954 where separate offenses are charged." In this case a hearing by the Supreme Court was denied.

[6] In the instant case, though the complaint is framed in two counts, the conduct charged against the defendant in the second is identical with that charged in the first. The utterance is the same and the circumstances the same. It would be impossible for the defendant to be guilty upon either count without being guilty upon both. In these circumstances, regardless of whether or not the rule announced in People v. O'Keefe ought to be followed, as to which we express no opinion, we think the situation here presented is closely analogous to that involved in People v. Spagnoli, supra, and that, while it would be better practice to ask the jury to find separately on each count, the municipal court was not in error in treating the verdict as sufficient in form as a conviction upon both counts.

[7, 8] It is further claimed that the trial court erred in denying defendant's motion, made at the close of the People's case, to dismiss the action for insufficiency of evidence to sustain any verdict of conviction. A preliminary objection is made by the district attorney to any consideration of this contention on the ground that the ruling complained of is not appealable. Pen. Code, 1466, as amended by St. 1935, p. 2145, § 1. Conceding that to be true, it is nevertheless a matter properly reviewable on the appeal from the judgment. Technically, of course, a motion to dismiss for insufficiency of evidence is not in order, the proper motion being to advise the jury to acquit in such a case. Pen. Code, § 1118; People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L.R.A. 783. Substantially, however, the appellant's contention under this head raises generally the question of whether the evidence, as disclosed by the record, can, as a matter of law, justify the conviction, an inquiry manifestly proper, since it goes to the basis for the judgment.

We have, in pursuing that inquiry, to examine the contention that the communication here involved was privileged.

In discussing the question of privilege, it is proper to notice at the outset that there is considerable difference between the provisions applicable respectively to civil actions and to criminal prosecutions, for slander.

The provisions of the Civil Code, in so far as we have occasion to mention them, section 47, define privileged communications as those made:

"1. In the proper discharge of official duty.

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law. * * *

"3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent."

[9] In a civil action the privilege extended by the first two subdivisions of section 47 has been held to be absolute and unqualified (Hale Co. v. Lea, 191 Cal. 202, 205, 215 P. 900), provided the publication is relevant to the official duty involved or to the cause or subject of inquiry (Wyatt v. Buell, 47 Cal. 624). The sort of relevancy required is further defined in Irwin v. Newby, 102 Cal.App. 110, 282 P. 810, 283 P. 370. On the other hand, the forms of privileged communications defined by subdivisions 3, 4, and 5 of section 47, applicable to libel and slander alike, "are

protected by a qualified privilege only; that is, to make the defenses available, the publication and the circumstances surrounding it must conform to the conditions laid down in the statute." 16 Cal.Jur. 67, citing Longsworth v. Curson, 56 Cal.App. 489, 206 P. 779.

In the opinion of the Supreme Court denying a hearing in the last-mentioned case it is said (at page 497 of 56 Cal.App., 206 P. 779, 782): "Under our Code, if a publication is libelous on its face, or is shown to be so by extrinsic evidence, the plaintiff may recover compensatory damages without proof of malice. When the defendant pleads that the publication was made without malice and upon a privileged occasion of the character defined in either subdivisions 3, 4 or 5 of section 47, the defendant must first make a prima facie showing of the absence of malice, and then, but not until then, the plaintiff may in rebuttal prove actual malice on the part of defendant." Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1.

By contrast a "malicious intent to injure another" is made, by section 258 of the Penal Code, an essential ingredient of the crime of slander.

As respects privilege, that section goes on to provide that: "Words uttered in the proper discharge of an official duty, or in any legislative or judicial proceeding, or in any other official proceeding authorized by law, shall be privileged and shall never be deemed a slander within the meaning of this section."

[10] This language, it will be observed, contemplates an absolute, not a qualified, privilege, and corresponds to that employed in the first two subdivisions of section 47 of the Civil Code.

The Penal Code does not contain any provision, in terms, for any qualified privilege in slander cases, though such provision may be thought in some sort implicit in section 259, Penal Code, which provides that: "The injurious utterance of slander is presumed to have been malice save when it is a communication to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information."

[11] The scope, however, given to any claim of qualified privilege under this latter section is greatly restricted by the construction given to the cognate provision of the libel statute, section 256, Pen.Code, of which, in People v. Turner, 28 Cal.App. 766, 772, 154 P. 34, 37, involving a newspaper publication of untrue defamatory matter respecting a candidate for office, it was said: "We are further satisfied, however, that section 256 of the Penal Code has no application to cases of this character. * * * In the present case it is not disputed that the publication was false. It was therefore not privileged."

[12, 13] What impresses us, however, about the provisions for absolute privilege contained in section 258 of the Penal Code, as well as any provision for qualified privilege that may be thought to be implied in section 259 of that Code, as these enactments are applied to the present case, is the broad scope allowed by both for the jury's construction of the conduct involved. The defamation here complained of was not uttered in the actual course of "any legislative or judicial proceeding, or in any other official proceeding authorized by law." No official body or tribunal was in session, though both Faber and Clausey were members of the board of trustees of Coronado. The communication can, under section 258, be the subject of absolute privilege, therefore, only if uttered "in the proper discharge of an official duty." Even if it be conceded that the communication was deemed by Faber in some sort connected with his official duty as a member of a board charged with seeing that Coronado had a fit police chief, yet the evidence shows that it was made in an effort to convince Clausey that the investigation ought to be entrusted to Faber rather than to other members of the board. Whether, in all the circumstances, what Faber intended and was attempting was a "proper" discharge of official duty, appears to us a question for the jury rather than one which any court could in a criminal case decide as a question of law. We have not, of course, overlooked the expression of the Supreme Court in Carpenter v. Ashley, 148 Cal. 422, 83 P. 444, 7 Ann.Cas. 601, wherein it is holden that in an action of slander, where the facts and circumstances under which the words were spoken are undisputed, the question whether they are privileged is one of law for the court to determine; and that it is in such circumstances error to submit that matter to the jury. This, however, was decided in a civil action where the mental attitude

of the defendant is not of primary importance. It seems to us inapplicable to a criminal prosecution wherein the malicious intent to injure or its absence is of vital importance and has in itself a bearing on the claim that official duty was being "properly" performed. The like comment may be applied to any qualified privilege, if such there be, implicit in section 259. The defamation was manifestly "injurious," and it is saved from being presumptively malicious only in the circumstances defined in these sections. It can hardly be said as a matter of law to have been made "to a person interested therein, by one who is also interested," since it was competent for the jury to believe that Clausey was not otherwise interested than as the matter was pressed on his attention by Faber and whether Faber "stood in such relation," to Clausey, "as to afford a reasonable ground for supposing the motive for the communication innocent," would seem manifestly a question of fact for the jury's decision.

[14] We are given some pause, however, in any idea that section 259 does actually provide even a qualified privilege, by the circumstance that the presumption raised by it does not afford the only means of proving malice. Even if the presumption of malice there contemplated were, by reason of the saving clause, deemed in a given case to be dissipated, it would still be competent to show malice by evidence dehors the communication itself, in which case any privilege consequent merely on the absence of malice would disappear.

[15] In view of what has been said we cannot hold that, as a matter of law, the evidence is insufficient to sustain the verdict.

It remains, however, to discuss the instructions given and refused.

[16] Defendant's counsel asked the court to instruct the jury that it was its province to determine the law and the fact, citing in that connection section 9 of article 1 of the California Constitution. The requirement therein contained that the jury be permitted to judge of the law as well as the facts is, by its terms, applicable to prosecutions for libel. Slander was not, at the time the provision was adopted, a crime, having been made such by subsequent legislation, and, though libel and slander have in some degree a common character, we do not feel called upon to read into the constitutional provision a requirement not in terms there that the questions of law in a slander prosecution must be left to the jury's determination. It will be noted that the last sentence of section 251 of the Penal Code, carrying this constitutional requirement into the statute in libel cases, has no analogy in the subsequently enacted statutory provisions relating to prosecutions for slander, although in section 260 of the Penal Code the other provisions of section 251 were in substance repeated. The omission seems to have been ex industria made. In our opinion, therefore, this instruction was properly refused.

The court gave, at the defendant's request, the following instruction: "You are instructed that words 'uttered in the proper discharge of official duty' or 'when it is a communication to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information', shall never be deemed a slander within the meaning of section 258 of the Penal Code, which is the section under which this proceeding is being prosecuted."

[17, 18] This instruction is plainly erroneous, but, since it errs on the side of the defendant and was requested by him, he cannot complain of it in itself. We may point out, however, that it is in reality an attempt to blend matter contained in sections 258 and 259 of the Penal Code, respectively, and confuses the situation of absolute privilege provided for in section 258, with the exceptions contained in section 259 to the applicability of the presumption of malice there declared, and that it fails utterly to allow for the circumstance that any qualified privilege, if such there be, based in the saving clause in section 259 may be done away with by proof, extrinsic to the communication involved, that it was animated by malice.

The court gave upon the People's request an instruction as follows:

"I instruct you that a public official is as much entitled to protection from defamation as any other citizen and that an individual who indulges in defamatory assertions about public officers is equally responsible for his acts with those who commit the same offense against private individuals and that such defamatory matter uttered against a public officer is not a privileged communication."

"I further instruct you that where a defamatory publication is false it is not privileged."

[19] We are constrained to the opinion that in giving this instruction the trial court fell into reversible error. The plain meaning of the last sentence which is in no respect modified by what precedes it, is that no untrue statement of a defamatory nature can in any circumstance be privileged. The instruction appears to be based on the expression in People v. Turner, supra, to which we have already alluded in this opinion, but that case affords no authority for such a statement. What was there held, as we have already noted, was that the qualified privilege extended in libel cases by section 256 of the Penal Code has no application to communications in fact untrue. The cognate, though different, provisions with respect to slander are contained in section 259 of the Penal Code already discussed. Whatever their effect, they are additional to and distinct from the provisions for absolute privilege embodied in the last sentence of section 258. This distinction the instruction completely ignores and, taken alone, its plain effect was to tell the jury that, if the communication was untrue, they must bring in a verdict of guilty.

[20] The court also erred in giving, at the People's request, the instruction that: "Absence of malice is an essential element of privilege and where malice is present the privilege does not exist. The law does not accord to anyone the privilege of maliciously making a false and defamatory statement concerning anyone."

This instruction is taken bodily from Morcom v. San Francisco Shopping News, 4 Cal.App.2d 284, 289, 40 P.2d 940, which was a civil action for libel. The privilege under discussion was the qualified privilege declared by subdivision 3 of section 47 of the Civil Code, which we have already discussed. The expression states the law with respect to the situation in that case. It cannot properly be applied in a criminal prosecution for slander to preclude a jury from passing on a defendant's claim to such absolute privilege as is asserted in the instant case.

The court gave a further somewhat involved instruction, apparently attempting to construe section 259 of the Penal Code, which we will not quote in full, but merely say of it that, if taken by itself, it would, again, amount to telling the jury that no communication at all can be privileged unless it be both true and free from malice, which again ignores the provision for absolute privilege contained in section 258.

The three erroneous instructions last referred to were of course inconsistent with the one that we have discussed, given at the defendant's request, which erred almost as seriously in the other direction; but, when the four are taken together, the net effect is to leave the jury in absolute confusion with respect to the whole subject of privilege.

The defendant asked and the court refused the instruction that "the casual presence of a third person (in this case Mrs. J. J. Clausey, the wife of J. J. Clausey) is not of itself sufficient to remove the privilege."

The authority relied on in support of this request is Fahr v. Hayes, 50 N.J.L. 275, at page 280, 13 A. 261, 263, a civil action, where it was said: "It is true there were hearers who are not shown to have been lawfully interested, and that the defendant had an opportunity in his own office of making the disclosures to Thoma without further publicity. But he was entitled not merely to warn, but to convince, Thoma, of the danger of trusting the plaintiff, and for this purpose he had a right to confront the plaintiff, and there declare whatever was of itself within the privilege. The presence of bystanders at that meeting was a mere casual incident, not in any sense sought for by the defendant, and for which therefore he should not be held responsible."

[21, 22] We need not for the purposes of this case go so far as to decide that the rule thus announced in New Jersey ought, in this state, to be followed in its full extent, nor do we think the language of the proposed instruction happy. The question seems to be a new one in this jurisdiction. Treating it as such, we think it proper to say, since there will have to be a retrial of the instant case, that in our opinion the defendant is entitled to some instruction to the effect that the casual presence of an uninterested third party does not necessarily remove the privilege. What precautions the presence of such third party may require of the one claiming the privilege to prevent its abuse seems to us in such a case as this a question for the jury.

By reason of the errors pointed out, the judgment and order denying a new trial are reversed and the case remanded to the municipal court to be retried.

We concur: TURRENTINE, J.; GRIFFIN, J.

11 Cal.2d 108

In re BELDON'S ESTATE.

DE PARCQ et al. v. O'BRIEN et al.

L. A. 16113.

Supreme Court of California.

April 1, 1938.

Rehearing Denied April 28, 1938.

1. Wills 🔑449

The making of a will raises a presumption that the testator intended to dispose of all his property.

2. Wills 🔑587(1)

Generally, residuary clauses are inserted in a will for the purpose of making complete disposition of all testator's property and should receive broad and liberal interpretation with view of preventing intestacy as to any portion of the estate of the testator.

3. Wills 🔑449

Where the language of a will in light of surrounding circumstances will not reasonably admit of more than one construction, rule of liberal interpretation with view of preventing intestacy as to any portion of the estate cannot be applied.

4. Wills 🔑440

In construing will, the court's inquiry is limited to ascertaining what testator meant by the language which was used.

5. Wills 🔑449

If a testator uses language which results in intestacy, and there is no doubt about the meaning of the language which was used, court must hold that intestacy was intended, since testator has a right to make a will which does not dispose of all his property but leaves a residue to pass to his heirs under laws of succession.

6. Wills 🔑449

Courts are not permitted to adopt a construction based on conjecture and to what testator may have intended, although not expressed in a will in order to avoid conclusion of intestacy.

7. Wills 🔑449

The rule which directs a court to prefer that mode of interpretation which prevents intestacy is applicable only where there is an ambiguity. Probate Code, § 102.

8. Wills 🔑435

A court may not under the guise of construction make a will for testator to take the place of one made by him if its intent is plain. Probate Code, § 102.

9. Wills 🔑449

Under will leaving to "the legal descendants of Robert (Pat) Nellies 3 children Rosemary & Will & Frances & his 2 Grandchildren 15 percent of the balance of my estate and 10 per cent to Mike's son," there being two surviving sons of Robert (Pat), 15 per cent. of residue of estate was to be distributed to the seven persons designated, immediately preceding the words "15 percent of the balance of my estate," and 10 per cent. to persons designated as Mike's sons, notwithstanding such distribution left an intestacy as to part of residue.

In Bank.

Appeal from Superior Court, San Diego County; L. M. Turrentine, Judge.

Proceeding in the matter of the estate of D. W. Beldon, also known as David William Beldon, deceased, with respect to the controversy between Mrs. Rose De Parcq and another and William J. O'Brien and others as to the construction of certain language contained in the testator's holographic will on proceedings for final distribution of the estate. From a portion of the decree authorizing final distribution, Mrs. Rose De Parcq and another appeal.

Reversed.

For prior opinion, see 71 P.2d 326.

Dempster McKee, Charles Fox, and Dwight D. Bell, all of San Diego, for appellants.

E. Swift Torrance and Wright, Monroe, Thomas & Glenn, all of San Diego, for respondents.

EDMONDS, Justice.

A controversy between the heirs of William Beldon, deceased, over the construction of his will has reached this court upon an appeal from a final decree of distribution of his estate.

By an holographic will the testator made certain specific bequests, among which is one of $30,000 to his sister, Rose De Parcq. He also provided as follows: "My sister Rose is hereby appointed administratrix & executrix without Bonds of this will, to the legal Descendants of Roberts (Pat) Nellies 3 children Rosemary & Will & Frances & His 2 Grandchildren 15 percent of the balance of my estates and 10 per cent to Mikes son. after all my just Debts are paid anyones who tries to interfere with the purpose & intent of this will shall Be cut off with an allowance of not over $1.00 inheretance under this will." The probate court held that by the language "Rosemary & Will & Frances" the testator referred to the three children of Nellie Ameling, his deceased sister. The expression "& his 2 Grandchildren" was intended by the testator, the court found, to refer to the two children of Catherine Andres, the deceased daughter of his deceased brother, Robert, or Pat, O'Brien. This brother also had two sons, who are now living and who will share in the estate under the clause mentioning his "legal descendants." Another finding of the court is that by the words "Mikes son" the testator referred to William Loftus O'Brien, the son of William O'Brien, another deceased brother. A further intent of the testator, as found by the probate court, was that his will should dispose of all of his property. Upon these findings 7½ per cent. of the residue of his estate was distributed to each of the "2 Grandchildren," 10 per cent. to Michael Loftus O'Brien, and 15 per cent. to each of the other persons. Rose De Parcq and William Loftus O'Brien appealed from that determination.

The testator's family name is O'Brien. He and his brothers and sisters were orphaned early in life and were "farmed out" to neighboring families. At the age of fifteen the testator ran away from his foster parents to make his own way in the world. Different occupations carried him to the far corners of the earth, and for many years his relatives knew nothing of his whereabouts. During and after the World War he was a member of this country's secret service, and it was then that he changed his surname to Beldon. The testator never married and in his later years he sought out his sister Rose O'Brien De Parcq and his nieces Rosemary and Frances, who are the daughters of his deceased sister, Nellie. In the course of the few visits and the correspondence that followed, a cordial friendship developed, especially between him and his sister Rose. It was she who, at a time prior to the making of his will, furnished him with a complete list of his heirs and it was she who attended him in his last illness. At different times he wrote her that she was the executrix of his will and a legatee under it. In one letter he said: "When the time comes inform your husband that I have specified you Rose as executrix of my estate in my will and the two copies of same and it all is left to my Brothers and Sisters or Pro Rata to their children Mikes Boy & Pats Boys & daughters children & Nells 3 living children."

The testator's estate was appraised at almost $190,000. His heirs at law are his sister Rose, four nephews, two nieces, and two children of a deceased niece. When the various legatees named in the residuary clause of the Beldon will are identified, it appears that "the legal Descendants" of Pat, "Nellies 3 children" and the "2 Grandchildren" number seven persons, other than "Mikes son." To these persons the testator left "15 per cent of the balance of my estates." As "Mikes son" is given 10 per cent. of the residue of the estate, the seven persons cannot each be given 15 per cent. of it. The construction of the will which was adopted by the probate court avoided this impossible result by considering the "2 Grandchildren" as the legatees of one 15 per cent share, and dividing it between them. By this method the entire residue of the estate was distributed to the persons named by the testator.

The appellants concede the rule that where ambiguity exists, a construction which reaches complete testacy is proper, but they insist that the uncertainty here relates only to the identity of the beneficiaries and not to the quantum of the bequest. The testator, they say, has imperfectly described a group of seven people but has limited his gift to that group with absolute clarity; he has said "15 per cent" not "15 per cent each." If the appellants' position is correct, the testator died intestate as to 75 per cent. of the residue of his estate.

[1-5] "The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator; and this general rule is in harmony with the declaration of our Code that the provisions of a will must be construed, if possible, so as to effect that purpose." O'Connor v. Murphy, 147 Cal. 148, 153, 81 P. 406, 408. But there is no room for application of the rule if the testator's language, taken in

the light of surrounding circumstances, will not reasonably admit of more than one construction. A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used. If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended. A testator has the right to make a will which does not dispose of all of his property but leaves a residue to pass to his heirs under the law of succession. Such a will is not the usual one, but when the language which leads to that result is clear the will must be given effect accordingly. In re Estate of Young, 123 Cal. 337, 55 P. 1011; In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Johnson, 107 Cal.App. 236, 290 P. 314.

[6-9] Possibly David William Beldon intended to leave his property as it was distributed by the decree of the probate court. But he did not express this intention in his will. Certainly he did not intend to leave 15 per cent. of the residue of his estate to each of seven persons with 10 per cent. to another, and there is nothing to support the division of one of the 15 per cent. shares between the "2 Grandchildren" except mathematical necessity. To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the testator's property. "Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed." In re Estate of Hoytema, 180 Cal. 430, 181 P. 645, 646. Only where there is an ambiguity may the rule, which directs a court to prefer that mode of interpretation which prevents intestacy, be applied. Section 102, Prob.Code. A court may not, under the guise of construction, make a will for a testator to take the place of the one made by him if its intent is plain. And this is so regardless of the consequences of the testator's will.

The decree is, therefore, reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.

I concur in the judgment: HOUSER, J.

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11 Cal.2d 113

RAYNOR v. CITY OF ARCATA.

Sac. 5142.

Supreme Court of California.

April 1, 1938.

1. Automobiles ⚷245(19)

In action against municipality for injuries sustained when motorist was struck at intersection by automobile driven by fire chief who was answering emergency call, where chief testified that he sounded siren continuously, negative testimony of motorist and of witness that they heard no siren sufficed to make question whether warning was sounded, for jury. Civ.Code, § 1714½, now St.1935, p. 152, § 400.

2. Automobiles ⚷175(3, 4)

An authorized emergency vehicle responding to an emergency call is exempt from limitations of speed and other rules of the road, such as those relating to the right of way. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554.

3. Automobiles ⚷175(5)

Under statute exempting driver of an authorized emergency vehicle from rules of the road, provision that exemption does not relieve driver from duty to drive with "due regard" to the safety of the public means that driver must, by suitable warning, give others a reasonable opportunity to yield the right of way. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554.

[Ed. Note.—For other definitions of "Due Regard," see Words & Phrases.]

4. Automobiles ⚷175(5)

Under statute exempting driver of an authorized emergency vehicle from rules of the road, and providing that exemption does not protect driver from "arbitrary exercise of privileges," "arbitrary exercise" cannot be predicated upon the elements of speed and failure to observe other rules of the road, where warning has been given. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554.

5. Automobiles ⚷246(2)

In action against municipality for injuries sustained when motorist was struck at intersection by fire chief who was responding to emergency call, instruction which authorized jury to predicate finding of negligence on fire chief's speed and failure to observe stop sign, even though jury should find that sufficient warning was given by fire chief, was error. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554; Civ.Code, § 1714½, now St.1935, p. 152, § 400.

6. Automobiles ⇨246(2)

In action against municipality for injuries sustained when motorist was struck at intersection by fire chief who was answering emergency call, instruction that operation of fire automobile on the streets required a greater amount of care than the use of motor vehicles where maximum speed is fixed by law was erroneous. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554; Civ.Code, § 1714½, now St.1935, p. 152, § 400.

7. Automobiles ⇨175(1)

The conduct of the driver of an authorized emergency vehicle responding to an emergency call is actionable only where it is in the nature of willful misconduct. St. 1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554.

8. Courts ⇨90(1)

In action against municipality for injuries sustained when motorist was struck at intersection by fire chief who was answering emergency call, a decision of the Supreme Court, which was rendered in a similar action, after trial of instant action, was declaratory of existing law applicable when accident occurred. St.1929, pp. 539, 542, §§ 120, 132, now St.1935, pp. 178, 187, §§ 517, 554; Civ.Code, § 1714½, now St.1935, p. 152, § 400.

9. Statutes ⇨225

Statutes on same subject matter should be read together and each given full force and effect, as far as possible.

10. Automobiles ⇨187

The state waiving right of itself and its governmental agencies to subrogation against their employees by statute excusing members of city fire and police department from liability of damages arising from their operation of motor vehicles in line of duty did not thereby deny right of action against itself or city for such damages. Civ.Code, § 1714½, now St.1935, p. 152, § 400; St.1929, p. 568, now St.1935, p. 153, § 401.

11. Subrogation ⇨1

"Subrogation" is substitution of one in place of another, and no one can complain of waiver of such privilege for any reason by one in whose favor subrogation runs.

[Ed. Note.—For other definitions of "Subrogation," see Words & Phrases.]

12. Subrogation ⇨1

"Subrogation" is creature of equity and is administered as to secure real and essential justice, without regard to form.

13. Constitutional law ⇨70(1)

The rule that statutes imposing a liability on governmental agencies in derogation of the common-law rule are to be strictly construed does not confer upon courts the power to nullify legislation, where the statute itself evinces a clear intention of Legislature to depart from the common-law rule.

14. Automobiles ⇨187

A municipality or other public employer is liable for injuries caused by negligent operation of motor vehicles by any of its servants or employees, on doctrine of respondeat superior, notwithstanding statute excusing policemen and firemen from liability for damages caused by their operation of motor vehicles in line of duty. Civ.Code, § 1714½, now St.1935, p. 152, § 400; St.1929, p. 568, now St.1935, p. 153, § 401.

15. Constitutional law ⇨81

The police power of the state inheres in sovereignty, and any exercise of the power which has a tendency to protect life and limb is in the interests of public weal.

16. Automobiles ⇨230

In action against municipality for injuries sustained when motorist was struck at intersection by automobile driven by fire chief who was answering emergency call, motorist was not required to file claim for injury with city council within 90 days after accident, since statute requiring notice does not apply where action is based on negligent operation of public motor vehicle rather than on dangerous or defective condition of public property. Civ.Code, § 1714½, now St.1935, p. 152, § 400; St.1931, pp. 2475, 2476.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by I. W. Raynor against the City of Arcata for injuries sustained in an automobile collision. Judgment for plaintiff for $5,000, and defendant appeals.

Judgment reversed.

Prior opinion, 65 P.2d 838.

Blaine McGowan and Bronson, Bronson & McKinnon, all of San Francisco (John H. Painter, of San Francisco, of counsel), for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ in support of City of Arcata.

F. Bert Fernhoff, City Atty., John W. Collier, Asst. City Atty., and J. Kerwin Rooney, Deputy City Atty., all of Oakland, and John J. O'Toole, City Atty., of San Francisco, amici curiæ.

E. S. Mitchell, of Eureka, for respondent.

PER CURIAM.

Plaintiff received personal injuries when his automobile was struck by an automobile of defendant city which was being operated by the fire chief in response to an alarm. From a judgment entered on a jury verdict assessing the damages of plaintiff in the sum of $5,000, defendant city prosecutes this appeal. The action was brought under section 1714½, Civil Code, now section 400, Vehicle Code, St. 1935, p. 152, by which cities are made liable for injuries to person or property resulting from negligent operation of municipally owned motor vehicles by city officers, agents, or employees.

The accident occurred in the intersection of Sixteenth and G streets in defendant city. The Redwood highway proceeds along G street at this point. Plaintiff was driving southerly along said highway at about 5:30 o'clock on the afternoon of March 20, 1933. The traffic was heavy on both sides of the highway. Plaintiff entered the intersection with his car in second gear, at a speed estimated by him to be about 20 miles an hour.

The fire chief, James A. Wyatt, in response to a fire alarm, was proceeding easterly along Sixteenth street. Plaintiff testified that he looked to the right and left as he entered the intersection, but did not observe the fire chief's car. He also testified that he heard no siren or horn sounded. He did not know what hit him until he recovered consciousness after the accident, but thought perhaps it was an aeroplane.

The fire chief's automobile was a Ford roadster painted red. The fire chief testified that when he heard the alarm, sounded as customarily by the blowing of a whistle at the California Barrel Company, he was at his home, a distance of five blocks from the intersection where the collision occurred. The number of blasts of the whistle indicated the general locality of the fire. As he proceeded easterly along Sixteenth street, the emergency red light on his car was lit and the siren was sounded continuously. The siren was a standard type used on fire equipment and was in working order. The speed of the chief's car was estimated by witnesses at 50 miles an hour.

Complainant alleged that the fire chief drove at an excessive speed; that he failed to stop or slacken his speed at the boulevard stop at Sixteenth street entering the highway; that the chief's car did not have a proper or efficient siren; and that the chief did not sound a siren or other signal with sufficient distinctness to be heard.

[1] Under our recent decision in Lucas v. City of Los Angeles, Cal.Sup., 75 P.2d 599, the vital issue in this case is whether the fire chief sounded his warning siren as he proceeded at a high rate of speed in response to the fire alarm. The plaintiff himself and the driver of the car immediately following his car testified that they heard no siren. Negative testimony of this sort is sufficient to create a conflict in the evidence as to whether a warning siren was in fact sounded. Thompson v. Los Angeles & S. D. B. Ry. Co., 165 Cal. 748, 134 P. 709; Keena v. United Railroads, 197 Cal. 148, 239 P. 1061; Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 296, 44 P.2d 465.

Nevertheless we are of the view that the judgment in favor of plaintiff must be reversed as being incompatible with the law as declared in the Lucas Case, supra. In the Lucas Case the plaintiff was a guest in an automobile involved in an intersection collision with a police car responding to an emergency call. It was contended that the police car was being operated at an unlawful rate of speed and that the driver was negligent in failing to obey a mechanical signal at the intersection, which showed "Stop" for traffic moving in the direction of the police car, and "Go" for traffic moving in the direction of the car in which plaintiff was a guest.

[2] Our decision in the Lucas Case reversed a judgment for plaintiff. Our opinion states that no contention was made that

the siren was not sounded. A warning siren having been sounded, negligence of the driver could not be predicated on his rate of speed or failure to obey the "Stop" sign. An authorized emergency vehicle responding to an emergency call is exempt from limitations of speed and other rules of the road, such as those relating to the right of way. The exemption from speed limits and right of way is statutory. Sections 120 and 132, Motor Vehicle Act, St. 1923, pp. 556, 560, as amended by St.1929, pp. 539, 542; now sections 517 and 554, Vehicle Code, St.1935, pp. 178, 187. The exemption from other rules of the road has been established by judicial decisions, notably by Balthasar v. Pacific Electric Ry., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452.

[3, 4] The provisions in sections 120 and 132, supra, to the effect that the exemptions there given shall not relieve the driver of an emergency vehicle of the duty to drive with due regard to the safety of the public, means that the driver must, "by suitable warning, give others a reasonable opportunity to yield the right of way." Lucas v. City of Los Angeles, Cal.Sup., 75 P.2d 599, 603. The sections also provide that the exemption shall not protect the driver from "an arbitrary exercise" of the privileges there granted. But an arbitrary exercise of said privileges cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given. "In such cases speed, right of way, and all other 'rules of the road' are out of the picture." 75 P.2d 599, 605.

[5] In the instant case the evidence as to whether a warning signal was given was in conflict. The vice of the instructions given to the jury is that they authorize the jury to predicate a finding of negligence on the fire chief's speed and failure to observe the boulevard stop even though the jury should conclude upon the conflicting evidence that a sufficient warning signal had in fact been given. The effect of the instructions was to authorize the jury to determine as a matter of fact whether in traveling at the rate of speed shown and in failing to observe the boulevard stop the fire chief had driven "with due regard for the safety of all persons using the highway" or had been guilty of an "arbitrary exercise" of the privileges accorded emergency vehicles.

[6, 7] The court also gave the following instruction: "You are further instructed that when operating a fire automobile on and over the streets, a greater amount of care is required than in those cases of the use of motor vehicles where the maximum limit of speed is fixed by the law." This admonition to the jury was repeated in the instruction immediately following, couched in slightly different phraseology. In view of the rule, declared in Lucas v. City of Los Angeles, supra, that the conduct of the driver of an authorized emergency vehicle responding to an emergency call is actionable only where it is in the nature of "wilful misconduct," the above instructions were prejudicially erroneous.

[8] Although our recent decision in the Lucas Case was rendered after trial of the action herein, said decision is declaratory of existing law applicable when the accident herein occurred. The effect of said decision was to settle the law, which theretofore had been in a state of confusion due to conflicting appellate court decisions.

If appellant city is correct in certain further contentions urged by it, then the action should not be retried under correct instructions, but entry of judgment for defendant should be directed. We are of the view that these further contentions cannot be upheld.

Appellant contends that a city cannot be held liable for *any* act of a member of its fire department committed while responding to a fire alarm, for the reason that under chapter 263 of the Statutes of 1929, p. 568, the fireman himself cannot be held liable. Chapter 263 was approved by the governor on the same day as section 1714½, Civil Code, which was enacted as chapter 260 of the Statutes of 1929, p. 565. Chapter 263 was as follows: "No member of a fire department or police department maintained by a county, city and county, incorporated or unincorporated city, town or district, shall be held liable in *any* civil action for damage to persons or property occasioned by *any* act of such member arising out of the operation, in line of duty, of a motor vehicle of such department while responding to an alarm of fire or an emergency police call." (Italics ours.) Now embodied in section 401, Vehicle Code, St.1935, p. 153.

Section 1714½, Civil Code, now section 400, Vehicle Code, imposes liability on cities and other governmental agencies for negligent operation of motor vehicles by public officers and employees. The second paragraph of the section gives the public employer a right of subrogation to recover from the officer or employee the amount of any judgment recovered by the injured person against the public employer. The third paragraph authorizes the public employer to insure against the liability imposed. The effect of this section was to impose liability on the public employer for negligent operation of public vehicles in the performance of governmental, as well as proprietary, functions. The section contains no exemption from liability where the vehicle is a police or fire department automobile responding to an emergency call.

The decisions of the appellate courts are in conflict on the question whether a public employer may be held liable for "negligent operation" of a police or fire department car under section 1714½, Civil Code, when the operator himself is free from liability under chapter 263. In Armas v. City of Oakland, 135 Cal.App. 411, 27 P.2d 666, 28 P.2d 422, and Tuten v. Town of Emeryville, 139 Cal.App. 745, 35 P.2d 195, liability of the public employer is denied.

The doctrine of the cited cases is that when liability of the public employer rests solely on the doctrine of respondeat superior, that is, liability of an employer, itself free from blame for the wrongful acts of an employee, a law which releases the employee must be construed as relieving the employer. Said decisions find that the right of the public employer which has been held liable in damages to recover from its employee the amount of the judgment against it is an inseparable incident of the liability imposed on the public employer by section 1714½. Where the right over against the employee does not exist, which is the case where chapter 263 applies, section 1714½ imposes no liability on the public employer, said decisions hold.

On the other hand, a contrary conclusion is reached in Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 44 P.2d 465, and Lossman v. City of Stockton, 6 Cal. App.2d 324, 44 P.2d 397. In those cases the vehicle was a police ambulance responding to an emergency call. Such a vehicle would seem to come within chapter 263 as a vehicle of the police department responding to "an emergency police call." In the Lossman Case the relation of section 1714½ and chapter 263 of the Statutes of 1929 was discussed at length, it being assumed that the police ambulance driver was within chapter 263. In the instant case the fire chief was responding to a fire alarm, and hence was plainly within chapter 263. The fire chief was not acting outside the line of his duty because the fire was on the other side of the street which marked the city limits. He was under a duty to respond to the alarm whistle blown within the city. It was not shown that he was aware that the fire was beyond the city limits. Furthermore, protection of lives and property within the city required his presence at the scene of the fire and the extinguishing of a fire scarcely over the line.

[9-12] We regard the remarks made by the appellate court in the Lossman Case as correctly declaring the law on this phase of the case. The court there said:

"It is a well-recognized rule that statutes upon the same subject-matter should be read together and each given full force and effect as far as possible. The Legislature recognized that members of the police and fire departments in the performance of their duties are often called upon to exceed the ordinary speed limit and take the right of way. If such employees were compelled to weigh the chances and assume a personal responsibility, speed and efficiency would be affected. The Legislature, however, realized that such operation of motor vehicles on the streets did create a hazard to the general public and therefore provided that the city should be held liable when the exercise of governmental functions resulted in injury to its people. The Legislature also at the same time authorized its governmental agencies to obtain insurance to indemnify itself against loss by such actions. If, too, an employee is unduly reckless or careless in the operation of the vehicle under his control the municipality still retains its rule-making and disciplinary powers and can, as any private concern, under similar circumstances, exercise restraint over its employees.

"It cannot be argued that because the state deemed it expedient to waive its right of subrogation against its employees, that it thereby denied a right of action against itself. Subrogation is the substitution of one in the place of another, and if for any reason the one in whose favor such subrogation runs cares to waive such privileges, no one can complain. Subrogation is considered as the creature of equity and is so administered as to secure real and essential justice without regard to form." 6 Cal.App.2d 324, 331, 44 P.2d 397, 401.

[13] We are mindful of the rule that statutes imposing a liability on governmental agencies in derogation of the common-law rule are to be strictly construed. But this does not confer upon courts the power to nullify legislation where the statute itself evinces a clear intention on the part of the lawmakers to depart from the common-law rule.

[14] The liability of the city or other public employer still rests on the doctrine of respondeat superior. In order that the public employer may be held, there must be a "negligent operation" of the vehicle by the employee. The fireman or policeman responding to an emergency call is relieved of personal liability for his negligence, but the city may be held therefor. It follows from the discussion in the earlier part of our opinion herein that there is a "negligent operation" of an authorized emergency vehicle responding to an emergency call only where the driver of such vehicle fails to give a timely warning, or otherwise makes an "arbitrary exercise" of the exemption from rules of the road which can be said to be willful misconduct.

[15] The cases which hold that, after an ordinary private employee has been held not negligent, his private employer may not be held on the doctrine of respondeat superior, are not controlling here. The basis of said decisions is that, after it has been held that the employee is free from negligence, it cannot be held in an action against the employer that such employee has been guilty of negligence. But in the situation before us the exemption of the employee does not rest on an adjudication of his freedom from negligence, but on the statutory declaration that he should be free from personal liability for his negligent acts. It is but the exercise of the police power of the state, which inheres in sovereignty. Any exercise of this power which has a tendency to protect life and limb is in the interest of the public weal.

[16] The plaintiff was not required to file a claim for his injuries with the city council within 90 days after the accident. The provisions of Statutes of 1931, p. 2475, Deering's Gen.Laws 1931, Act 5149, p. 2562, are not applicable herein, where the injury is alleged to have resulted from negligent operation of a public motor vehicle, rather than from the dangerous or defective condition of public property. Act 5150, Stats.1931, p. 2476, relates to liability of public officers, not to liability of the city or other governmental agency. Jackson v. City of Santa Monica, 13 Cal. App.2d 376, 57 P.2d 226.

For prejudicial error in the instructions given, the judgment is reversed.

11 Cal.2d 64

ENGSTROM v. AUBURN AUTOMOBILE SALES CORPORATION et al.

L. A. 16462.

Supreme Court of California.

March 28, 1938.

Rehearing Denied April 25, 1938.

1. Automobiles 🔑192(7)

The liability of an automobile sales agency for injuries resulting from the negligent operation of one of its automobiles by prospective buyer must be based upon statute making owner of motor vehicle liable for injuries resulting from negligent operation of motor vehicle by any person using or operating it with the permission, express or implied, of the owner. St.1935, p. 153, § 402.

2. Trial 🔑142

A directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such verdict were given.

3. Automobiles 🔑242(6)

Under statute imposing upon automobile owner liability for the negligent operation of vehicle with the permission, express or implied, of owner, a permissive use may not be inferred from a showing of ownership alone so as to impose liability on owner. St.1935, p. 153, § 402

4. Evidence 🔑53, 595

An "inference" is a permissive deduction while a "presumption" is a deduction directed to be drawn by law. Code Civ.Proc. §§ 1958, 1959.

[Ed. Note.—For other definitions of "Inference" and "Presumption," see Words & Phrases.]

5. Evidence 🔑89

Generally, a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence.

6. Evidence 🔑89

A presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which rebutting evidence is absolutely conclusive.

7. Evidence 🔑89, 591

Under statute relating to calling of adverse party as witness, testimony of witness so called is not binding on party calling him and does not serve to dispel a presumption upon which such party relies. Code Civ. Proc. § 2055.

8. Evidence 🔑89

An inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side.

9. Evidence 🔑89

An inference is not dispelled as a matter of law if evidence offered in opposition is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities.

10. Evidence 🔑595

When it is said that a certain inference is warranted by certain facts proved, no more is meant than that the jury is reasonably warranted in making that deduction from the facts proved. Code Civ.Proc. § 1958.

11. Automobiles 🔑242(6)

Undisputed evidence showing that owner intrusted automobile to prospective buyer for a limited time only, and that at expiration of such time prospective buyer operating automobile in violation of promise caused injuries to plaintiff, rebutted inference of permissive use resulting from the ownership of the automobile, and owner was not liable for injuries caused by prospective buyer. St.1935, p. 153, § 402.

12. Trial 🔑69

Where trial consumed several days and at close of testimony and after motion for directed verdict had been made plaintiff requested that case be reopened to permit securing of testimony of witness who was known in advance would not be in attendance at trial, refusal to reopen or continue the case was within court's discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Harold C. Landreth, Judge.

Action by Walter A. Engstrom against the Auburn Automobile Sales Corporation, a corporation, and others for injuries alleged to have been inflicted by reason of negligent operation of an automobile owned by the named defendant and operated with its consent by a prospective buyer. Judgment for the defendants, and plaintiff appeals.

Affirmed.

Prior opinion, 69 P.2d 901.

George B. Bush, and Philip C. Farman, both of Los Angeles, for appellant.

Parker & Stanbury and White McGee, Jr., all of Los Angeles, for respondents.

Bronson, Bronson & McKinnon, of San Francisco, amici curiae.

WASTE, Chief Justice.

Plaintiff brought this action for damages against the operator and the owner of an automobile for injuries alleged to have been inflicted by reason of its negligent operation. The gravamen of the complaint as to the owner is the use of the car by the operator with the alleged consent and permission of the owner, an automobile sales agency, granted by its sales manager and a salesman, who were also made defendants. The jury returned a verdict in the sum of $10,000 against the operator of the car. However, on motion of the owner and its said two employees, the court directed a verdict in their favor upon which judgment was accordingly entered. It is from this judgment that the plaintiff prosecutes this appeal.

[1] In an action of this character, the liability of the owner, if any, must be found in the provisions of section 1714¼ of the Civil Code, now section 402 of the Vehicle Code, St.1935, p. 153, which, so far as material here, provides, in part, that "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

In the instant case the respondent owner was an automobile sales agency and the operator was a prospective purchaser who, at his request concededly had been given permission to use the car, for the purpose of showing or demonstrating it to members of his family prior to purchasing a similar model, a matter that ultimately failed to materialize. The appellant relies on the permission so given, and the inference of permission asserted to arise from the admission in the pleadings of respondent's ownership of the car, as a showing under the provisions of section 1714¼, supra, sufficient to preclude the trial court from directing, as it did, the return of a verdict in favor of the respondent owner and its named employees.

[2] It is settled that a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given. Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768. Measured by this rule, we fail to perceive any error in the action of the trial court. The accident in which appellant's injuries were received occurred at about noon on July 26, 1935, on a main highway outside the city of Los Angeles and at a distance of approximately twelve miles from respondent's salesroom. It is stipulated herein that the undisputed evidence adduced at the trial established the time and place of the accident. Such stipulation was prompted by the absence from the transcript of the evidence bearing thereon. In fact, the only testimony included in the reporter's transcript, pursuant to appellant's specific request, was that of the respondent salesmen detailing principally the circumstances and conditions under which the automobile was intrusted to the defendant Silkman who was operating it at the time of the accident. These witnesses, who appeared for the defense testified without contradiction that, after Silkman had presented himself as a prospective purchaser and had been given a demonstration of the car's ability, he requested permission to drive the car unaccompanied to the Blackstone Hotel, a distance of from two to three miles from the salesroom, in order that he might show it to "Ma and Sis." After some consultation between the sales manager and salesman, it was agreed that defendant Silkman might take the car for the purpose specified. However, the evidence indisputably discloses that Silkman was expressly told he was to return the car within an hour and a half or two hours at the outside. He agreed to this condition and promised to return the car within two hours. He departed the salesroom with the car at about 5 p. m. on July 25, 1935. He did not return the car within the agreed time. In fact, he did not return it that day or night. On the contrary, he returned it the following day at approximately 4 p. m., the accident having occurred shortly prior thereto. Following the expiration of the period prescribed for the return of the car, the respondents made several efforts to locate the defendant Silkman. Their efforts in this regard culminated shortly prior to its return in a report to the police department that the car had been stolen.

[3] The appellant made no effort to controvert the evidence that the car had been intrusted to Silkman for the limited period of two hours or that the accident had occurred long after the period had expired. The evidence in this respect is uncontradicted. Under the circumstances, we are of the view that the reasoning and conclusion in the case of Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 569, 44 P.2d 581, are applicable and determinative of the present cause. In the cited case, as here, the owner had granted permission to the operator to drive the car for a prescribed period. There, as here, the car was not returned as promised and the accident occurred subsequent to the expiration of the prescribed period. There, as here, the trial court directed a verdict in favor of the owner of the car. Upon appeal it was contended by the plaintiffs, as it is substantially urged herein, that the "facts concerning the ownership of the automobile and its use by the defendant Herndon raised an inference that such use

was with the consent of the owner; that this inference was sufficient to establish a prima facie case for the plaintiffs; and that the jury should have been permitted to pass on the question of the permissive use of the automobile from a consideration of the inference on the one hand and the testimony of Herndon [operator] and Hamlin [president of the owner-corporation] on the other."

In disposing of this contention it was declared: "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner. Bradford v. Sargent, 135 Cal.App. 324, 333, 27 P.2d 93. Also, it is undisputed that the only permission given Herndon to use the car was that he might have it for a particularly specified period. The accident happened a day after this time expired. To hold that Herndon was then driving the car with either the express or implied consent of the owner would require us to disregard the plain agreement of the parties. The time within which Herndon had permission to use the car having expired, he was not driving it thereafter with the permission, either express or implied, of the owner. Union Trust Co. v. American Commercial Car Co., 219 Mich. 557, 189 N.W. 23." This court denied a hearing in the cause. We also denied a hearing in the case of Howland v. Doyle, 6 Cal.App.2d 311, 314, 315, 44 P.2d 453, 454, wherein the owner of a truck granted permission to a prospective purchaser to try out the vehicle, which task, unknown to the owner, was thereupon delegated to a third person who was driving at the time of the accident. Plaintiffs were there nonsuited as to the owner. Upon appeal, they urged that a showing of ownership was sufficient under section 1714¼, supra, to preclude the granting of a nonsuit. In rejecting this contention, the opinion asserts that "section 1714¼ places upon the owners of automobiles a statutory liability which otherwise would not exist. Before this section can be applied, it must appear by the proof that the vehicle was used or operated 'with the permission, express or implied, of such owner.' The existence of such permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved as an essential element of the cause of action. Such proof must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied. Where the evidence does not warrant either of such inferences, section 1714¼ does not apply as a matter of law." The opinion then goes on to point out that from the granting of permission to a designated person to test the truck it may not be implied or inferred that the owner thereby consented to the operation of the truck by a third person to whom the task of testing the truck had been delegated unknown to the owner. Necessarily, the decision is very definite authority for the proposition that from a showing of ownership alone a permissive use may not be inferred so as to preclude a nonsuit as to the owner.

Hoffman v. Lane, 11 Cal.App.2d 655, 54 P.2d 477, and Boland v. Gosser, 5 Cal.App. 2d 700, 43 P.2d 559, relied on by the appellant, are distinguishable, for in each case, in addition to a showing of ownership, there was other affirmative evidence from which a permissive use might reasonably be inferred. In the instant case, the inference of permissive use must find support, if at all, in the fact of ownership alone. This is so, in view of our conclusion that at the time of the accident the car was being operated after the express permission theretofore granted by the owner had expired.

[4] However, even if we assume for present purposes that a showing of ownership alone is sufficient to give rise to an inference of permissive use within the meaning of section 1714¼, supra, we fail to perceive wherein appellant's cause would be aided. Under the circumstances disclosed by the record now before us, we cannot accept appellant's theory that such inference, based on ownership alone, may stand in the face of the uncontradicted testimony above outlined to the effect that the operator of the car at the time of the accident was driving it in violation of his agreement with and promise to the owner to return it a day prior to the accident. The rule governing the dispelling of an inference is materially different from that relating to the dispelling of a presumption. It should be kept in mind that an inference is a permissive deduction, while a presumption is a deduction directed to be drawn by law. Sections 1958, 1959, Code Civ.Proc. Some of the cases relied on by appellant in support of his contention that the inference of permissive use arising from a showing of ownership creates a prima facie case which precludes a trial court from granting a nonsuit or a motion for a

directed verdict are cases (notably Smellie v. So. Pac. Co., 212 Cal. 540, 299 P. 529) involving presumptions, as to which, as we have stated, the rule differs from that applicable to inferences, while others of the cases relied on by appellant have fallen into the all too prevalent error of using the terms "presumption" and "inference" interchangeably and synonymously, with a consequent confusion of the rules applicable thereto.

[5-7] It is not our purpose to here attempt a detailed discussion, explanation, or reconciliation of the many cases on the subject. Generally speaking, however, it may be said that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. Smellie v. So. Pac. Co., supra; Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 8, 210 P. 269; Pitt v. So. Pac. Co., 121 Cal.App. 228, 232-235, 9 P.2d 273; Peters v. Cal. Bldg.-Loan Ass'n, 116 Cal. App. 143, 154, 2 P.2d 439; Fortier v. Hogan, 115 Cal.App. 50, 56, 57, 1 P.2d 23. However, a presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive. Smellie v. So. Pac. Co., supra. (Illustrative of such rare cases would be a situation, referred to in the Smellie Case, supra, 212 Cal. 540, 552, 299 P. 529, wherein one party relies on the presumption that a person unheard of for seven years is dead and the other party to meet and overcome such presumption actually produces the person in court.) In passing, it should also be mentioned that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not binding on the party calling him, and for the purpose now under consideration he is not considered to be a witness of the party so calling him, and therefore his testimony does not serve to dispel a presumption upon which such party relies. Smellie v. So. Pac. Co., supra, 212 Cal. 540, 555, 299 P. 529.

[8, 9] On the other hand, an inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side. Maupin v. Solomon, 41 Cal.App. 323, 324-326, 183 P. 198; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461. Of course, if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities, an inference is not dispelled as matter of law. A few of the many cases applying this latter principle are: Bushnell v. Yoshika Tashiro, 115 Cal. App. 563, 566, 567, 2 P.2d 550; Wagnitz v. Scharetg, 89 Cal.App. 511, 517, 265 P. 318; Grantham v. Ordway, 40 Cal. App. 758, 765, 182 P. 73; Dierks v. Newsom, 49 Cal.App. 789, 794, 194 P. 578. The Bushnell Case, supra, was so distinguished in Bourne v. Northern Counties, etc., Co., 4 Cal.App.2d 69, 71, 40 P.2d 583 (hearing denied here), while the Dierks and Grantham Cases, supra, and other similar cases, were likewise so distinguished in Fahey v. Madden, 56 Cal. App. 593, 596-598, 206 P. 128, and Ransford v. Ainsworth, 196 Cal. 279, 286-288, 237 P. 747.

Sufficient reference has been made to the cases to illustrate our point. As already indicated, to explain or attempt to reconcile all of the cases on the subject would be a futile task because of the confusion between a presumption and an inference that has crept into many of the cases and the varying circumstances of each case.

[10] In denying a hearing in Maupin v. Solomon, supra, 41 Cal.App. 323, 326, 183 P. 198, 199, we attempted to point out the distinction, too frequently overlooked, between a presumption and an inference. We there said that "we desire to point out that respondent's prima facie case was based solely on an 'inference,' and not on any 'presumption' declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. Section 1958, Code Civ.Proc. In this case the direct uncontradicted evidence introduced in response to the prima facie case as to the circumstances under which the employe of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference, based solely on the fact of appellant's ownership of the automobile, and the further fact that the person driving was an employe of appellant, that the driver was

acting within the scope of his employment at the time of the accident." We had occasion to quote this language with approval in Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 333-335, 54 P.2d 709, wherein we also attempted to distinguish or reconcile, as here, some of the many cases on the point now under discussion.

[11] In the light of this summary of the subject, we are of the opinion that the inference of permissive use relied on by the appellant as arising solely from the ownership of the automobile (assuming such inference does so arise) has been fully and completely dispelled in this case by the positive, unequivocal, and uncontradicted testimony produced by the respondents to the effect that the automobile had been intrusted to Silkman for a limited period only and that at the time of the accident such period had long since expired and Silkman was then operating the car in violation of his promise and agreement and against the express wish and desire of the owner. This undisputed testimony precludes any attempt to infer that Silkman's use of the car was a permissive one. Appellant's argument, if carried to its logical extreme, would permit an inference of permissive use from ownership alone, even in the face of uncontroverted proof that at the time of the accident the car was being operated by one who had stolen it. Certainly, even appellant would not contend for such a result. Yet, Silkman's failure to return the car within the time expressly limited by the owner made his subsequent use thereof as much against the wish and desire of the owner as that of the thief in the supposititious case.

[12] We find no merit in the contention that the trial court erred in refusing to reopen or continue the case to permit appellant to secure the testimony of the defendant operator Silkman. Aside from the fact that appellant merely states the point without argument to support it, examination of the transcript discloses that the trial court acted well within its discretion in denying the requested relief. The trial consumed several days and it was not until after respondents had moved for a directed verdict and the judge had indicated his intention to grant said motion that plaintiff and appellant moved to reopen the case in order to procure the defendant Silkman's testimony. The trial court was correct in declaring that the motion to reopen "comes at the close of the testimony in the case and after motions have been made upon which the court has indicated his probable ruling. The fact that Mr. Silkman was not expected to attend the trial was intimated on the first day of the trial, and was definitely stated on the second court day of the trial. Prior to this time no request has been made for a continuance or for any process or order of this court which might secure the presence of Mr. Silkman, nor has the plaintiff made any effort to secure the taking of the deposition of the defendant Silkman. * * * "

It goes without saying that it was proper to direct a verdict in favor of the two salesmen involved.

The judgment appealed from is affirmed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J; HOUSER, J.; SEAWELL, J.

LONG v. RUMSEY.*

L. A. 16445.

Supreme Court of California.

April 4, 1938.

Rehearing Granted May 2, 1938.

1. Frauds, statute of ⇨138(4)

Statutes providing that an agreement which by its terms is not to be performed during lifetime of promisor or an agreement to bequeath any property or to make any provision for any person by will is invalid unless in writing and subscribed by party to be charged or by his agent does not apply to action in quantum meruit for reasonable value of services rendered under an express oral contract by which promisors agree to leave property by will. Civ.Code § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

2. Executors and administrators ⇨205(1)

Even if a servant seeking to recover for reasonable value of services performed under an express oral contract by which a husband and wife had agreed that surviving spouse would convey their community estate to servant did not establish an express contract, an implied promise to pay the reasonable value of services would be sufficient to justify a recovery by servant. Civ.Code § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

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*For subsequent opinion see 84 P.2d 146.

3. Limitation of actions ⚷49(2)

An action for reasonable value of services rendered husband and wife under an express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant by deed or will, if servant would work for them as long as they desired, was not barred by limitations, where action was brought within 2 years after death of surviving spouse, notwithstanding servant left employ of spouses with their consent 16 years prior to death of surviving spouse, since breach did not occur until death of surviving spouse. Code Civ.Proc. § 339.

4. Work and labor ⚷28(4)

In action for reasonable value of services rendered husband and wife under an express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant, objection to amount of verdict on ground that it was result of passion and prejudice could not be sustained where evidence was sufficient to authorize verdict in amount fixed.

5. Work and labor ⚷28(4)

In action in quantum meruit, the financial condition of person for whom services may have been performed does not form a satisfactory basis for a determination of reasonable value of services.

6. Appeal and error ⚷1050(1)

In action for reasonable value of services rendered husband and wife under alleged express oral contract by which spouses promised that, if servant would work for them as long as they desired, surviving spouse would convey community estate to servant by deed or will, where servant had left employ with consent of spouses after having worked approximately 6¼ years, admission of evidence as to value of estate was prejudicially erroneous.

7. Appeal and error ⚷1064(1)

In action for reasonable value of services rendered husband and wife under alleged express oral contract by which spouses promised that, if servant would work for them as long as they desired, surviving spouse would convey their community estate to servant by deed or will, instructions permitting jury to base their determination as to reasonable value of services upon evidence relating to value of the estate which had been erroneously introduced was prejudicially erroneous.

8. Appeal and error ⚷1056(1)

In action for reasonable value of services rendered husband and wife under express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant by deed or will and that they would furnish servant with board, lodging, clothing, and "spending money," where servant had worked 6¼ years and then left with approval of spouses, exclusion of evidence with respect to reasonable value of food, shelter, clothing, and "spending money" was prejudicial error.

9. Executors and administrators ⚷221(3)

In action for reasonable value of services rendered husband and wife under express oral contract by which servant was to receive board, lodging, clothing, and "spending money" and in addition the community estate of the spouses on death of survivor, where servant worked for spouses for 6¼ years and then left with their consent, evidence with respect to amount of wages, which, during a period of time embraced within 6¼ years of employment was paid by other employers to their employees, who at that time performed similar services to those at which servant was employed, was admissible.

EDMONDS and SEAWELL, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Meta Long, formerly Meta Klatt, against Harry C. Rumsey, executor of the estate of Ida Fricke, deceased. From a judgment for the plaintiff, and from an order denying a motion for judgment notwithstanding the verdict, the defendant appeals.

Judgment reversed and appeal from order denying the defendant's motion for judgment notwithstanding the verdict dismissed.

Prior opinion, 69 P.2d 857.

George W. Downing, Jr., and Carey McWilliams, both of Los Angeles, for appellant.

Edwin J. Miller and Ralph W. Miller, both of Los Angeles, for respondent.

PER CURIAM.

After further study and consideration of the opinion the District Court of Appeal rendered in the above-entitled cause, we are of the opinion that the law applicable to the facts of said case has been correctly applied by the District Court of Appeal, and that that court reached the correct conclusion concerning the matter involved in said cause. We, therefore, adopt the opinion of the District Court of Appeal, written by Mr. Justice Houser, which is as follows:

"This is an appeal by defendant, as executor of the will of Ida Fricke, deceased, from a judgment that was rendered on a creditor's rejected claim against said estate, as well as from an order by which his motion for judgment notwithstanding the verdict was denied.

"The essential facts are that in their lifetime August Fricke and Ida Fricke (husband and wife), who were engaged in the bakery business in the city of Los Angeles, promised to Meta Klatt, then 17 years of age, that if the latter would work for August and Ida Fricke 'as long as they desired her to do so,' in compensation for such services, in addition to being furnished by the Frickes with board, lodging, clothing, and 'spending money,' on the death of the survivor of August Fricke and Ida Fricke, all the property which had been accumulated by them 'would belong to' Meta Klatt, 'and that the survivor of said community would leave the same by deed or will to her.' In such circumstances, Meta Klatt was induced to and did perform all services that were required of her by the Frickes for a period thence next ensuing of approximately 6¼ years, at the expiration of which time, with the consent and approval of August Fricke and Ida Fricke, she was married to one Long. Thereafter, excepting occasionally, when she was paid $3 per day for her services, she performed no labor for the Frickes.

"In the course of about 16 years after Meta Klatt had left their said service, first August, and then Ida Fricke, died. No provision in any way having been made by either of them for carrying out their original promise that on the death of the survivor of them all their property would go to Meta Klatt, and her asserted claim against the estate of Ida Fricke having been duly rejected by the executor of her last will, Meta Klatt, suing by her married name, instituted an action against the said executor for the value of the services which she had rendered as aforesaid, which action resulted in a judgment in her favor. It is from that judgment, as well as from an order by which defendant's motion for judgment in his favor, notwithstanding the verdict, was denied, that the instant appeal is taken.

[1] "It is conceded by respondent that, in accord with appellant's contention, an oral agreement to devise or to bequeath any property or to make any provision for any person by will is unenforceable, 'whether the action be either for a breach of an oral contract to make a will, for specific performance of such contract, or for damages for the breach of such a contract.' Section 1624, Civ.Code; section 1973, Code Civ.Proc. It is unnecessary to decide, and this court does not undertake to decide, whether that concession on the part of respondent is a correct and all-inclusive statement of the law. But, without regard to respondent's position in that connection, by an examination of the allegations in her complaint, it is disclosed that the action was not of the exact character which is indicated by the provisions of the statute, but, to the contrary, was 'on the quantum meruit for the reasonable value of plaintiff's services rendered.'

"In that regard, in effect, it is provided, both by section 1624, subdivision 6, of the Civil Code (enacted in 1905) and by section 1973, subdivision 6, of the Code of Civil Procedure (enacted in 1907), that 'an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will,' is invalid, 'unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged or by his agent.' Since the date of the enactment of subdivision 6 of section 1624 of the Civil Code, the courts have experienced no great difficulty in arriving at the conclusion that, ordinarily, an oral agreement of the kind that in the instant matter is shown to have existed was unenforceable; but beginning with the case of Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 190, 188 P. 1034, 1039, and thereafter continuing throughout the decisions of the appellate courts of this state, it has been ruled that the provisions of the statute do not apply 'to a case like this for recovery upon a quantum meruit.' Warder v. Hutchi-

son, 69 Cal.App. 291, 231 P. 563; Lauritsen v. Goldsmith, 99 Cal.App. 671, 279 P. 168; Burr v. Floyd, 137 Cal.App. 692, 31 P.2d 402; Zellner v. Wassman, 184 Cal. 80, 193 P. 84. See, also, Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904; Turell v. Anderson, 16 Cal.App.2d 445, 60 P.2d 906.

[2] "Appellant's suggestion, that no express contract such as is outlined by the allegations of the complaint was proved, is of no avail. The record herein discloses the existence of sufficient evidence to establish the conclusion that such a contract was entered into by the respective parties; but even assuming the possible absence of such a situation, in each of several cases to which attention hereinbefore has been directed, the principle is announced that even an implied promise to pay the reasonable value of the services performed will suffice.

[3] "Without an abandonment of either of his prior contentions, appellant next urges the point that 'the recovery must be upheld, if at all, upon the quantum meruit theory, and the rules of limitation governing such actions are the ones which apply.' In that connection, it is conceded that, in an action such as that here involved, the cause of action accrues on the termination of the services that may have been rendered, with the result that the 2-year limitation on the commencement of such an action, for which provision is made in section 339 of the Code of Civil Procedure, should be given application. Such a rule is indicated in each of the cases of Lauritsen v. Goldsmith, 99 Cal. App. 671, 279 P. 168, Burr v. Floyd, 137 Cal.App. 692, 31 P.2d 402, and in Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281, where other California cases are cited as authority therefor. But it happens that in each of such cases the performance of services was practically continuous from the time when the agreement was entered into between the parties, at least until the date of death of the person who had promised the payment of compensation for such services. In that regard, it may be remembered that within the facts herein it appears, not that the agreed services were thus continuous; but, to the contrary, that with the consent and the approval of both the Frickes, Meta Klatt married one Long, and that thereafter, for a period of 16 years, or until the death of Ida Fricke, who was the survivor of said promisors, aside from the occasional rendering of services for which she was fully compensated, Meta Klatt performed no services in accordance with the terms of the agreement. In nearly all cases wherein is recognized the general rule to the effect that at least until the death of the promisor of compensation has occurred, no cause of action has arisen in favor of the person who has been performing the services—the reason for the existence of such rule is declared to be that the promise being that compensation would be made or provided by deed or will, until both the fact of the death of the promisor, together with the fact that he has failed to keep his said promise, can be established—in the absence of a prior repudiation of the contract, no breach of such contract has occurred. And assuming the legal soundness of such reason, it becomes clear that it is as applicable to the facts herein as it is in those cases in which the service is continuous to the date of the death of the promisor of compensation; that is to say, by the terms of the agreement between Meta Klatt, and August and Ida Fricke, the latter parties agreed to compensate the former party either by deed or by the will of the survivor of the latter; and therefore that August and Ida Fricke had all the time up to the date of the death of the survivor of them within which to fulfill the said promise; and not until such death had occurred could it be determined that the contract had been breached. Upon the happening of such breach, and not before, the cause of action accrued; and the action having been instituted within the time limited by the provisions of the statute (section 339, Code Civ.Proc.), it follows that appellant's point in that regard is not well taken.

[4] "The next point that is suggested by appellant is that the evidence was insufficient to support the judgement that was rendered in plaintiff's favor for the sum of $11,750. No useful purpose would be served by a review of the evidence that was presented on that issue. Of itself, and without here taking into consideration certain permissible offsets thereto, this court is convinced that, from the evidence which was placed before it, the jury was authorized to return the verdict of which complaint is made; from which it follows that appellant's additional objection to the verdict in respect to the amount thereof, to wit, that it was the result of passion and prejudice, cannot be sustained.

[5, 6] "Appellant registers further complaint regarding the conduct of the trial of

the action, to the effect that prejudicial error was committed, in that, over the objection of defendant, plaintiff was permitted to introduce evidence of the value of the estate. Although it may be possible that, if the action had been based on breach of contract, or for damages (if such an action were maintainable on such ground), the questioned evidence might have been admissible on the theory that the parties to the agreement had agreed that, for the services which Meta Klatt was expected to perform, she would be compensated with the entire estate which might be left by the survivor of the Frickes (O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861; Roy v. Pos, 183 Cal. 359, 366, 191 P. 542; Morrison v. Land, 169 Cal. 580, 590, 147 P. 259; 71 Cor. Jur. 439), it is clear that in an action in quantum meruit the financial condition of the person for whom services may have been performed can form no satisfactory basis for a determination of the reasonable value thereof. Had the parties agreed upon the amount of a specified legacy that would be left by the survivor of the Frickes to Meta Klatt, evidence of that situation might have been somewhat, albeit vaguely, indicative of the actual value of the services which the parties had in mind (Offeman v. Robertson-Cole Studios, 80 Cal.App. 1, 251 P. 830; Reynolds v. Jourdan, 6 Cal. 108, 111; Clark v. United States, 95 U.S. 539, 24 L.Ed. 518), provided, of course, that they also had in mind the length of time that thereafter probably would ensue before the survivor of the Frickes had deceased. It so happened that Meta Klatt actually worked for the Frickes for a total period of 6¼ years. The estate of Mrs. Fricke was inventoried at the net sum of approximately $23,500. To say that it was agreed between the respective parties to the agreement that, at the death of the survivor of August and Ida Fricke, Meta Klatt would become the possessor of the entire estate of such survivor, is not the equivalent of saying that for a specified period of 6¼ years of work it was agreed that Meta Klatt should be paid $23,500. It is manifest that at the date when the agreement was made no one knew the length of time thereafter that the survivor of the Frickes would live; nor did any person know but that Meta Klatt would be the first to die. Any one of them thereafter might live for 1 year, or possibly for 50 years. Everything in that line was not only undetermined, but likewise was indeterminable. On the very next day following the date of the agreement, had both the Frickes met with an accident which resulted in the immediate death of both of them, in an action in quantum meruit to recover the reasonable value of the one day's services of Meta Klatt, it would seem unreasonable to contend that those services were worth $23,500 because that was the implied value that had been placed thereon by the respective parties to the agreement. Furthermore, on the trial of the action, no showing was made regarding the financial worth of the Frickes at the date when the agreement was made. For aught that appears in evidence, they then may have been insolvent, or their financial worth may have been much more than it was when Mrs. Fricke died. They did not then know for what length of time the survivor of them would live; nor, even assuming that they then were worth a specified sum of money, did they know that they would not thereafter suffer such heavy financial reverses that by the time the survivor came to die the estate would not be bankrupt. In such a state of uncertainty, to admit evidence of the value of the estate left by Ida Fricke, for the purpose of establishing the reasonable value of the services that were performed by plaintiff, was erroneous. Lisk v. Sherman, 25 Barb., N. Y., 433, 439; Clark v. Gilbert, 32 Barb., N. Y., 576.

[7] "Presumably based upon evidence which had been introduced relative to the value of the estate which had been left by Ida Fricke, together with other evidence that related to the agreement made by the parties thereto, in three separate instructions the jury was told respectively, that if it so desired it might (1) 'adopt as the reasonable value of plaintiff's services, the value of the property of which said survivor died possessed, if such value is shown by the preponderance of the evidence'; (2) '* * * adopt * * * as the value of said services, the value which the parties themselves fixed, if shown by the evidence, viz., the value of the property so agreed to be awarded plaintiff by August and Ida Fricke, if the evidence shows such value, as the reasonable value of plaintiff's services'; (3) 'adopt * * * the value of services which the parties themselves placed on said services, if shown by the evidence, and fix the value of said services at what the parties themselves fixed said value of services to be, viz., the sum which you find from the evidence to be the value of the property at the time of the death of the said Ida Fricke.'

"Aside from that which might be termed a proper and deserving criticism for the repetition (and the resulting emphasis) of the instructions regarding the province of the jury with respect to a determination by it of the value of plaintiff's services, each of the cited instructions was subject to the further objection that in reaching a verdict in favor of plaintiff it was authorized to take into consideration certain evidence with reference to the value of the estate that had been erroneously introduced. Although from the fact that the appraised net value of the estate was approximately $23,500 and the amount of the verdict was $11,750, it may be that instead of awarding to plaintiff the full value of the estate, the jury may have concluded that one-half the value of the estate would be a sufficient compensation for her services—nevertheless, had the evidence respecting the value of the estate not been introduced, it might well be questioned whether the jury would have placed as high a value on plaintiff's services as in the circumstances was placed thereon. It results that, both by reason of the admission of the evidence to which reference has been had and by the said instructions, defendant was prejudicially affected.

[8, 9] "But with respect to the trial proceedings, appellant further complains that, by a ruling which was made by the trial judge, defendant was precluded from introducing evidence which, if believed by the jury, in all probability would have resulted in a substantial reduction of the amount of the verdict that was awarded to plaintiff. In that regard, it appears that plaintiff had introduced evidence respecting the value of the services that had been performed by her, which evidence, without taking into consideration the value of the board, lodging, clothing, and 'spending money' that had been furnished by August and Ida Fricke to plaintiff, consisted in a showing that for an eight-hour day such services as were performed by plaintiff were reasonably worth as much as $35 per week, with extra time to be paid for at the same rate of compensation. To partially offset the amount per week to which plaintiff might have been entitled, defendant 'proposed to put in evidence what these items (food, shelter, clothing and "spending money") so provided by the deceased, were reasonably worth.' The trial court sustained plaintiff's objection to the introduction of that line of evidence. This court is of the opinion that that ruling constituted prejudicial error. In the first place (if practicable), plaintiff's evidence with respect to the value of services that were rendered by her should have taken into account the several benefits which she had received from August and Ida Fricke. Assuming that plaintiff's services were worth $35 per week, with added compensation for overtime, nevertheless, as a credit on account of such value, in effect, she had been paid various sums of money, uncertain in amount, by having been furnished with room, board, clothing, and a certain amount of money called 'spending money.' In attempting to reach a determination of the amount, if any, for which plaintiff should recover a judgment, defendant should have been accorded the right to show the reasonable value of the room, board, and clothing, as well as the amount of money which plaintiff had received during the entire time that she worked for August and Ida Fricke. In the continuous course of 6¼ years, the value of such items would have aggregated a considerable sum, and to deny to defendant the right to any credit on account thereof would be to unjustly deprive the executor of the will of Ida Fricke of that to which in law he would have been justly entitled. In the same connection, and for similar reasons, this court also is of the opinion that, contrary to the ruling made thereon by the trial court, defendant should have been permitted to introduce evidence for the purpose of establishing the amount of wages which, during the period of time that was embraced within the 6¼ years of such employment, was paid by other employers to their respective employees who at that time were employed and who performed services in the same, or in a similar, position as or to, respectively, that in which plaintiff was employed. 16 Cal.Jur. 991; Shade v. Sisson M. & L. Co., 115 Cal. 357, 368, 47 P. 135.

"It becomes unnecessary to rule upon either of the additional specifications of error presented by appellant."

The judgment is reversed; and the appeal from the order by which defendant's motion for judgment notwithstanding the verdict was denied, is dismissed.

EDMONDS, Justice (dissenting).

I dissent. The facts relied upon by the respondent show a situation which is entirely different from that present in those cases where a plaintiff has been allowed to recover in an action on quantum meruit for services performed under an invalid contract to compensate for those services by will.

It has uniformly been held that an oral contract of the kind which the respondent claims that she made with August and Ida Fricke is unenforceable as being within the statute of frauds. Section 1624, Civ. Code; section 1973, Code Civ.Proc.; Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563. But this state has recognized the somewhat general rule that, where one who has made such an agreement has rendered services consistent with its terms continuously to the time of the death of the promisor, an action upon quantum meruit may be maintained. Under those circumstances the plaintiff recovers upon a quasi contract, or contract implied in law, which is remediable in an action upon the common count. Such a contract does not rest upon the intention of the parties but is entirely independent of agreement. It is implied in law, not in fact. Liability exists because of a duty which the law implies from the acts of the parties, and a recovery is allowed because under fundamental principles of equity and natural justice a servant is worthy of his hire. Hence, if services have been performed and they were not rendered gratuitously, the law implies a promise to pay for them. 6 R.C.L. 588. The obligation is one "created by law for reasons of justice." Restatement of the Law of Contracts, § 5.

Applying these principles to the facts shown by the respondent, it is apparent that any recovery by her must be upon a quasi contract, not upon the invalid and unenforceable express contract. Therefore, evidence of the express contract is admissible only for the limited purpose of proving that the services which the respondent rendered were not performed gratuitously. Grant v. Grant, 63 Conn. 530, 29 A. 15, 38 Am.St. Rep. 379; Wallace v. Long, 105 Ind. 522, 5 N.E. 666, 55 Am.Rep. 222. The respondent cannot rely upon the terms of the oral invalid contract. Therefore, she must recover, if at all, upon the duty to pay for her services which the law implies. That duty defines the contract of the parties. "The whole theory of allowing a recovery upon quantum meruit where the contract is found to be void under the statute proceeds upon an elimination of the contract. There is no contract in existence to be availed of by either the plaintiff or the defendant to fix their several rights, duties, or obligations. The action is based upon the equitable doctrine that the defendant having received the benefit should pay therefor what it was reasonably worth; that the implied promise to pay became enforceable when the services were rendered. * * * If, although the statute declared the contract to be void and incapable of enforcement, it could still be made use of to fix the respective liabilities of the parties, the statute would become a nullity." Thacher v. New York, W. & B. R. Co., 1912, 153 App.Div. 186, 138 N.Y.S. 463, 466. By the bringing of the action on quantum meruit the plaintiff in such a case repudiates the express contract, and the right to recover rests upon the same principles where a contract made in violation of the statute of frauds is voidable as it does where the contract is void. See note to Fabian v. Wasatch Orchard Co., 41 Utah 404, 125 P. 860, L.R.A.1916D, 901.

Disregarding then the terms of the invalid express contract, the respondent has proved a quasi contract to pay the reasonable value of her services with no time fixed for payment. If the services may be said to have been rendered for a continuous term, rather than upon a month to month basis payment became due at the time when they were completed. It is upon this theory that the courts have allowed a plaintiff to recover in an action upon quantum meruit where services were performed for an extended period prior to the death of the one for whom the services were rendered. The case of Etchas v. Orena, 127 Cal. 588, 60 P. 45, 46, presented the first opportunity for this court to state the rule. In that case the jury was instructed "that when one is employed continuously to perform personal services, without any time being fixed in the contract for its termination, the statute of limitation does not begin to run until the services are terminated." While the decision turned on the form of the probate claim which was presented, it may be said that the court, by inference, approved this instruction as a correct statement of the law. In the later case of Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562, the plaintiff sued upon an invalid express contract. However, the court recognized "the somewhat familiar rule that, where services are to be performed for a given period for a stated sum, without any agreement as to when the payment is to be made, and the contract is entire, * * * the obligation to pay does not become matured, and payment is not due until the services are completely performed." Under such circumstances, it said, "the plaintiff's remedy, if any, is an action for the value of the services rendered, and not an action for the sum alleged to have been agreed to be paid therefor."

Another instance of an action successfully maintained by one who had rendered services over a period of many years is found in the much cited case of Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 188 P. 1034, 1039. The evidence in that case showed that for 20 years continuously prior to the death of C. P. Dutton the plaintiff had rendered constant service in maintaining a home for him. In affirming the judgment the court said: "The services were continuous for a period of 20 years, and it is a fair inference that it was the intention or expectation that they should be rewarded when terminated. They did not cease until the death of Mr. Dutton. The case falls clearly within the rule announced in Krumb v. Campbell, 102 Cal. 370, 36 P. 664; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562; Furman v. Craine, 18 Cal.App. 41, 121 P. 1007; Clark v. Gruber, 74 W.Va. 533, 82 S.E. 338 [supra]; Morrissey v. Faucett, 28 Wash. 52, 68 P. 352. They are all to the effect that where the contract is for an indefinite time and no time for payment is specified, the statute does not begin to run until the services end." Mayborne v. Citizens' T. & S. Bank, supra. These conclusions were approved by this court in Corato v. Estate of Corato, 201 Cal. 155, 255 P. 825, 826, as being a correct statement of the law applicable to a situation "where it is understood, expressly or by reasonable implication, * * * that the compensation should be paid at the termination of the rendition of the services." In the Mayborne Case the intention to compensate the plaintiff upon the termination of her services by the death of the employer was inferred from his will, which, although insufficient in form to be admitted to probate, gave the plaintiff certain property "for care and failthful services rendered." But in the Corato Case, because there were no facts from which such an intention might be drawn, the presumption of a hiring from month to month was applied (section 3002, Labor Code, St.1937, p. 262, formerly section 2011, Civ.Code), with the statute of limitations running accordingly. The reasoning which led to the conclusion that the servant was entitled to a judgment on the action of quantum meruit is not entirely satisfactory in some of these cases. However, in each of them the controlling fact of continuity of service to the date of the employer's death is emphasized. For example, this was the situation shown in Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563. So, in Robinson v. Chapman, 98 Cal.App. 278, 276 P. 1081, a recovery was allowed for services rendered continuously for a period of nine years immediately prior to the death of the employer because it could be reasonably inferred from the facts there shown that payment was to be made upon the termination of the employment rather than at an earlier time. Another District Court of Appeal said that, where one had continuously performed services for a person over a long period of time, the law implies a promise to pay at the termination of the services. Lauritsen v. Goldsmith, 99 Cal.App. 671, 279 P. 168. The same conclusion was reached in Burr v. Floyd, 137 Cal.App. 692, 31 P.2d 402, 404, where continuous services had been rendered by an employee for some 7 years upon an agreement that the employer would make compensation therefor by will. The court said: "Not only does the law, under the circumstances disclosed by the record herein, imply a promise to pay the reasonable value of the services but the implication of the law is that payment shall take place upon the termination of the services." This statement of the rule was relied upon in Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904, 905, as authority for affirming a judgment in favor of the plaintiff where "practically without conflict in the evidence, and as declared in the court's findings of fact, the services that were rendered by plaintiff * * * were 'continuous.'"

Reference should also be made to the case of Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281. There the trial court found that services had been rendered continuously over a period of years except that on a number of occasions there was a cessation of those services caused by the wrongful temporary discharge of the plaintiff. Upon appeal it was held that, because the trial court also found that the plaintiffs were at all times, ready, able, and willing to perform the services, the finding of a temporary wrongful discharge was tantamount to a holding that the employer, during the periods of cessation of services, did not desire the plaintiff's assistance; therefore, there was only one term of service which terminated with the death of the employer. In this case the court recognized that the statute of limitations commences to run at a date in no event later than the termination of the services, and only because the facts warranted an inference that there was a continuous term of employment, notwithstanding the fact that services had been temporarily discontinued for periods within that term, were the plaintiffs able to avoid the bar of the statute of limitations. Nelson v. Christensen, 169 Wis. 373, 172 N.W. 741, presents the distinction more definitely. That action was brought to recover the value of services which had been rendered by a daughter to her mother. These commenced in 1893 and, except for the period between 1899 and 1907, continued until 1909, when the mother died. It was held that as there had not been a continuous period of service, the statute of limitations barred a recovery for services rendered during the entire period.

The services for which Meta Klatt seeks compensation in this action terminated more than 16 years before she presented her claim to the executor of the estate of Ida Fricke. If under the facts shown by her it may be said that the term of her service was a continuous one, rather than from month to month, it ended when she married and left the home of the Frickes. Consequently, in my opinion, the statute of limitations commenced to run at that time and her action is barred.

The judgment should be reversed, with directions to the trial court to render judgment for the appellant.

I concur: SEAWELL, J.

HUSSMAN et al. v. SOUTHERN PAC. CO. et al.

L. A. 16370.

Supreme Court of California.

March 1, 1938.

Prior opinion, 67 P.2d 137.

PER CURIAM.

Cause called for hearing on merits, W. I. Gilbert, of Los Angeles, appearing on behalf of appellants, and A. J. Getz of Los Angeles, on behalf of respondents. Written stipulation was presented, in accordance with which it is ordered as follows: The judgment of the Superior Court from which the appeal is taken is reversed, without costs; remittitur to issue forth.

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11 Cal.2d 81

WAHL v. WATERS et al. (WANNOP, Intervener).

Sac. 5184.

Supreme Court of California.

March 29, 1938.

1. Mandamus 🔑172

In mandamus to compel calling of election on question of dissolution of municipal utility district, which election district directors had refused to call because of alleged insufficiency of petition therefor, court could review facts set up in answer as those on which refusal was based, and determine whether such facts justified refusal. St. 1933, p. 2551, § 28.

2. Municipal corporations 🔑51

Under the Municipal Utilities District Act, signatures of electors who signed two petitions for election on question of dissolution of district were required to be counted in determining whether one petition bore sufficient number of signatures to require calling of election. St.1933, p. 2551, § 28.

3. Municipal corporations 🔑51

Under the Municipal Utilities District Act, that two electors' petitions for election on question of dissolution of district are on file at the same time does not warrant refusal to call election if either petition meets the statutory requirements. St. 1933, p. 2551, § 28.

4. Municipal corporations 🔑51

Under the Municipalities Utilities District Act, providing that election on question of dissolution of district shall be governed by applicable general election laws, and under the Political Code, requiring elector, on signing petition, only to designate his residence, signatures of electors who designated their residences but not their precinct numbers were required to be counted in determining whether petition for election on question of dissolution of district bore sufficient number of signatures to require calling of election. St.1933, p. 2551, § 28; Pol.Code, § 1083a, as amended by St.1933, p. 2471.

5. Mandamus ⟹74(2)

Under the Municipal Utilities District Act, requiring directors of district operating no works or properties to call election on question of dissolution of district on filing of petition of certain number of electors, determination of directors that district was operating works and properties when petition for election was filed was not conclusive, but was subject to judicial review in mandamus action to compel calling of election. St.1933, p. 2551, § 28.

6. Municipal corporations ⟹51

Where water plant controlled by municipal utility district was incapable of practicable operation as a revenue-producing utility when petition for election on question of dissolution of district was filed, district was not "operating works or properties," within the Municipal Utilities District Act, requiring directors of district operating no works or properties to call such an election on filing of petiiton of certain number of electors. St.1933, p. 2551, § 28.

7. Evidence ⟹20(1)

Under the Municipal Utilities District Act, requiring directors of district operating no works or properties to call election on question of dissolution of district on filing of petition of certain number of electors, in mandamus to compel calling of election, Supreme Court could not take judicial notice of the fact that water plant, which was incapable of practical operation as a revenue-producing utility on filing of petition, had been enlarged, and, with another system, which had been leased, supplied entire town with water. St.1933, p. 2551, § 28.

8. Mandamus ⟹187(9)

Under the Municipal Utilities District Act, requiring directors of district operating no works or properties to call election on question of dissolution of district on filing of petition of certain number of electors, in mandamus to compel calling of election, Supreme Court could not consider whether district operated works or properties after filing of petition, but only if it was doing so when petition was filed. St.1933, p. 2551, § 28.

9. Statutes ⟹190

Where the language of a statute was clear and unambiguous, there was no justification for any construction of it.

10. Judgment ⟹713(3)

A judgment in mandamus action by taxpayer, refusing to compel directors of municipal utility district to call election on question of dissolution of district, was not res judicata of mandamus action by another taxpayer for the same relief, where second action was based on different facts and different petition of electors, which was filed at later date than date of filing of petition on which first action was based. St. 1933, p. 2551, § 28.

In Bank.

Appeal from Superior Court, Butte County; Warren Steel, Judge.

Mandamus by William W. Wahl against A. R. Waters and others, as directors and board of directors of the Bidwell Municipal Utility District, to compel the calling of an election on the question of the dissolution of the district, wherein John Wannop intervened. From an adverse judgment, respondents appeal.

Affirmed.

For prior opinion, see 70 P.2d 945.

Coyle E. Bybee, of Chico, and Dion R. Holm, of San Francisco, for appellants.

Grayson Price, of Chico, and Elliott, Atkinson & Sitton, of Sacramento, for respondent William W. Wahl.

Devlin, Devlin & Diepenbrock, of Sacramento, for intervener and respondent John Wannop.

C. C. Carleton, Chief Atty., Department of Public Works, and Spencer Burroughs and Henry Holsinger, all of Sacramento, C. T. Waldo, of Pasadena, and Raymond S. J. Pianezzi, of Sacramento, amici curiæ on behalf of the Water Project Authority of California.

EDMONDS, Justice.

Upon the petition of the respondent, who is a qualified elector of, and property owner residing within, the Bidwell Municipal Utility District, the superior court ordered that a peremptory writ of mandate issue, requiring the defendants, constituting the board of directors of the district, to call an election upon the question of its dissolution. The appeal is from this judgment.

The district was formed at an election held in 1934 pursuant to the provisions of the Municipal Utilities District Act, Stats. 1921, p. 245, as amended. See 2 Deering's Gen.Laws, 1931 Ed., Act 6393, p. 3650. Its boundaries, which are not coterminous with those of any county or municipality, include approximately 400 square miles in the northern part of Butte county. The incorporated city of Chico and several unincorporated towns lie within it.

Apparently both the formation of the district and its acquisition of property have been vigorously opposed. The proceedings by which it was organized were challenged and finally upheld. Morrison v. White, 10 Cal.App.2d 261, 52 P.2d 261, and Id., 10 Cal.App.2d 266, 52 P.2d 263. In a later case the county auditor was required to deliver to the district a warrant for the amount of district taxes which had been collected. Bidwell Mun. Utility Dist. v. Knott, 16 Cal.App.2d 432, 60 P.2d 588. The present proceeding is based upon a petition which was filed with the secretary of the district on December 6, 1935. The respondents claim that under the provisions of the Municipal Utilities District Act, supra, upon the filing of this petition it became the duty of the directors of the district to call an election upon the question of dissolution.

The conditions under which the electors may require an election to be held are prescribed with particularity in section 28 of the act, which was added in 1933. Stats. 1933, p. 2551, Deering's 1933 Supplement, p. 2161. It provides: "The board of directors of any district which operates no works or properties, or whose exterior boundaries are coincident with the boundaries of a single city or town, may call an election at any time for the purpose of submitting to the qualified electors of said district the question of whether the district shall be dissolved; and the said board of directors must, upon the filing with the secretary of such district of a petition signed by qualified electors of said district, equal in number to not less than twenty-five per cent of the votes cast within said district at the general State election next preceding, asking that the question of dissolution of the district be submitted to a vote of the electors of the district, call such election." Section 28. The respondent alleged that a petition signed by qualified electors in the district equal in number to more than 25 per cent. of the votes cast within the district at the preceding general election and in the manner and form required by this act was filed with the secretary of the district, but that the directors failed and refused to call an election upon the question of the dissolution of the district although "said district has not at any time since the organization operated and does not now operate any works or properties." Another taxpayer was allowed to intervene upon a petition presenting the same allegations. The directors demurred to the respondent's petition upon both general and special grounds. After their demurrer was overruled, they answered, denying, among other allegations, not only that the petition had been signed by the number of qualified voters required by the act, but also that each of the persons who signed it had affixed his address, his occupation and the date of signing. They also denied the allegations of the petition that the district does not operate works or properties and as a separate defense alleged that the district "does now own and operate and ever since the 3rd day of December, 1935, has owned and operated works and properties consisting of a water plant serving numerous consumers in the Town of Durham."

As a further and separate defense the appellants pleaded the pendency of another action brought against them by one F. L. Martenette, also a taxpayer and residing within the district, to compel the calling of an election upon the same question. It is alleged that the judgment entered in favor of the directors in the case first brought is conclusive of the issues in the present action.

Upon these issues the court found that the petition filed with the secretary of the district on December 6, 1935, complies in all respects with the requirements of the act and that the district "did not on or before the 6th day of December, 1935, operate any works or properties within the meaning of the law under which the District was organized." It, therefore, concluded that the respondent was entitled to judgment and ordered that a peremptory writ of mandamus issue forthwith commanding the appellants to call an election upon the question presented by the electors' petition.

[1] The first contention of the appellants is that neither the petition of the respondent nor the one presented by the intervener states a cause of action against them and that their demurrer should have been sustained. They assert that the Municipal Utilities District Act, supra, makes no provision for the review by a court of the findings of the board of directors upon the sufficiency of an electors' petition; hence, such findings cannot be challenged except upon allegations of extrinsic or collateral fraud. In support of that position they cite People v. Los Angeles, 133 Cal. 338, 65 P. 749, Fresholtz v. Board of Trustees, 208 Cal. 502, 282 P. 501, and other cases where the power of a court to review the action of a board or council acting under similar statutes was passed upon. But the answer in the present case presents not only the determination of the board of directors that the electors' petition was insufficient, but also the facts upon which that conclusion was made. If the facts presented by the appellants and conceded to be true do not justify the board's determination, the rule contended for has no application.

The respondent filed his petition on February 20, 1936. The appellants' answer includes as an exhibit the certificate of the secretary of the district that the petition contains 2,998 signatures of which 506 do not comply with the requirements of the law. He also certified that 1163 of the signatures also appear on a petition filed with him on October 10, 1935, which also demanded an election upon the question of dissolution and was the basis for the action brought by F. L. Martenette against the appellants. Another determination made by the secretary was "that there are 2218 names appearing on said petition after which a purported precinct appears which precinct was not written by the person signing said petition."

[2, 3] It is admitted that the board of directors was not required to call an election unless the electors' petition contained 1,982 valid signatures. The act does not prohibit an elector from signing more than one petition and the 1,163 signatures which the secretary found to be on both petitions must be counted upon the petition which is the basis of the present controversy. The fact that two electors' petitions are on file at the same time does not warrant a refusal to act if either of them meets the statutory requirements. Morrow v. Board of Directors, 219 Cal. 246, 26 P.2d 292. Deducting the 506 challenged signatures from the total leaves 2,492 which is more than the required number unless the names of the 2,218 persons who did not write a precinct number cannot be considered.

[4] The Municipal Utilities District Act does not require an elector signing a petition to place his precinct number thereon. It provides that an election upon the question of dissolution shall be governed by the general election laws of the state so far as they may be applicable. Section 1083a of the Political Code at one time provided that wherever any petition is required to be signed by qualified electors, each person "shall at the time of so signing * * * affix thereto the precinct," but since 1933, when this section was amended, St.1933, p. 2471, the elector need only sign his name and "himself affix thereto his place of residence." Therefore, under the facts found by the secretary of the district, the petition bears the signatures of more qualified electors than are required by the act and the board of directors should have called the election demanded if, on the day it was filed, the district did not operate any works or properties.

[5] Although the appellants claim that upon the filing of the electors' petition it was within their exclusive province to determine, as a question of fact, whether the district was operating works or properties, their principal contention is that the evidence is insufficient to support the findings. In support of the first proposition there is evidence that on December 4, 1935, the board of directors adopted a resolution establishing a schedule of rates for the sale and service of water by the district. This resolution includes in its preamble the statement that the district "owns and operates certain water works and properties known as Durham plant No. 1 for sale and service of water." The electors' petition was filed with the secretary of the district on December 6, 1935. At a meeting of the board of directors held on January 4, 1936, the secretary reported the filing of the petition "and it was decided that no action be taken because the District is now operating works and properties." The present action was commenced February 20, 1936. The following day the board of directors adopted another resolution reciting that prior to and on December 7, 1935, the district was operating works and properties. However, the adoption of either of these resolutions

is not a conclusive determination of the question beyond the reach of judicial review if in fact the district was operating no works or properties at the time the electors presented their demand. If this were not the rule the election provisions of the act would be ineffective.

Upon the merits of the controversy the directors say that the district is the victim of forced interest and motives of a group which is not representative of the people. On the other hand, although the appellants may be thoroughly conscientious in their belief that the people of the Bidwell district should have municipal ownership of public utilities, until the district is actually operating works or properties its continuance lies within the control of the electors.

The minutes of the board of directors show that in September, 1935, the appellants learned of the movement to demand an election for the dissolution of the district. Up to that time they had been considering ways and means of acquiring a system for the distribution of electricity. But in the language of the respondent, they then became "water conscious." Negotiations were undertaken for a lease of a water system at Durham then in private ownership. The directors of the district and the owners of the plant agreed on the terms of such a lease and an application was made to the railroad commission for permission to make the transfer. This application was subsequently withdrawn. Afterward the plant which the trial court found to be incapable of practical operation was built.

[6-8] This was not a "plant" within the meaning of the statute. All of the evidence supports the finding of the trial court that upon the date when the electors' petition was filed this plant was incapable of practical operation as a revenue producing utility. And this court cannot take judicial notice of the fact, if it be the fact, that the original plant has now been enlarged and, with another system which has been leased, supplies the entire town of Durham with water. The sole question for decision in this case is whether the appellants were required to call an election under the facts existing in December, 1935. What has since been done cannot be here considered on appeal. Hence the order made by the railroad commission on October 7, 1937, is immaterial, and the subsequent motion of the appellants for leave to file a certified copy of it as part of the record upon this appeal must be denied.

Upon the argument of the appeal in this court, the appellants contended that the questions involved in this case have become moot because the district is now operating works and properties. "Ordinarily a writ of mandate will not issue to compel the performance of an official act if, when the writ is applied for, the time limited by law for action has expired; but this rule does not apply in a case like the one at bar, where the requirements and purpose of the law have been disregarded and defeated, of their own volition, by the very officers intrusted with the performance of a public duty which was clearly obligatory." Conn v. City Council, 17 Cal.App. 705, 716, 121 P. 714, 719.

[9] The Water Project Authority of the State of California has appeared herein as amicus curiæ, urging a liberal construction of the phrase "operates no works or properties" in the interest of the Central Valley Project. It is argued that state agencies which form an integral part of the plan of that project should be fostered and encouraged in the interest of public welfare and policy of the state as declared by the Legislature. But the Legislature has also given the electors residing in a utility district the right under certain conditions to determine whether a district shall continue in existence. The language of the statute is clear and unambiguous; hence there is no justification for any construction of it.

[10] The judgment in the action brought by F. L. Martenette against the directors was not a bar to the present suit. The first case was brought by another taxpayer and presented issues concerning the status of the district on October 10, 1935, and the sufficiency of the petition presented by the electors on that day. The present action is based upon different facts and a petition presented at a later date.

The judgment is affirmed.

We concur: WASTE, C. J., SEAWELL, J., HOUSER, J., SHENK, J., CURTIS, J., LANGDON, J.

11 Cal.2d 131

RICHARDSON, Superintendent of Banks, v. CRAIG et al.

L. A. 16521.

Supreme Court of California.

April 4, 1938.

Rehearing Denied May 4, 1938.

1. Limitation of actions 🔑3(2)

The 3-year limitation on actions against corporate stockholders to enforce liability created by law was not impliedly repealed by the Bank Stockholders' Liability Act, in so far as such limitation applies to actions to enforce assessments against stockholders of insolvent banks. St.1931, p. 338; Code Civ.Proc. § 359.

2. Limitation of actions 🔑34(5)

The 3-year limitation on actions against corporate stockholders to enforce liability created by law, and not the 3-year limitation on actions to enforce "liability created by statute," or the 4-year limitation on actions not otherwise provided for, applies to actions to enforce statutory assessments against stockholders of insolvent banks. St. 1931, p. 338; Code Civ.Proc. §§ 343, 359; § 338, as amended by St.1935, p. 1673.

3. Statutes 🔑158

A strong presumption exists against repeals by implication.

4. Limitation of actions 🔑34(5)

The 3-year limitation on actions against corporate stockholders to enforce liability created by law applies to such liability of corporate stockholders as general statutes may establish, unless specific limitation is prescribed for any particular liability, or unless provisions of statute providing for 3-year limitation are expressly negatived. Code Civ.Proc. § 359.

5. Limitation of actions 🔑58(5)

The statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created" begins to run on action to enforce statutory assessment against stockholders of insolvent bank when assessment is levied, and not when bank incurs debt for which assessment is levied, or when assessment becomes due. St. 1931, p. 338; Code Civ.Proc. § 359.

6. Limitation of actions 🔑58(5)

Where statutory assessment against stockholders of insolvent bank was levied January 28, 1932, and became due March 7, 1932, action on assessment, instituted February 8, 1935, was barred by statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created," since limitation began to run when assessment was levied. St.1931, p. 338; Code Civ.Proc. § 359.

7. Limitation of actions 🔑58(5)

Under statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created," question of whether liability is absolute or contingent, and question of when right to enforce liability may accrue, are immaterial in determining when liability is "created." Code Civ.Proc. § 359.

In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Friend W. Richardson, as State Superintendent of Banks, against John J. Craig and others to enforce an assessment against defendants as stockholders of an insolvent bank. From a judgment for defendants, plaintiff appeals.

Affirmed.

Prior Opinion, 70 P.2d 1011.

John G. Clock and Clock, McWhinney & Clock, all of Long Beach, for appellant.

Mathes & Sheppard and Lloyd Melvin Smith, all of Los Angeles, amici curiae for Superintendent of Banks, State of Ohio.

A. H. Brazil and C. P. Kaetzel, both of San Luis Obispo, amici curiae in support of petition on hearing.

John J. Craig, in pro. per., for respondents Hogan & Theriot.

Devlin & Devlin & Diepenbrock and A. I. Diepenbrock, all of Sacramento, Chase, Barnes & Chase, Lucius K. Chase, and Thomas R. Suttner, all of Los Angeles, Ben A. Hill, of San Pedro, and George P. Adams, Charles E. Beardsley, E. L. H. Bissinger, Randolph Karr, Evans, Pearce & Campbell, W. E. Evans, John L. Fleming, and Henry G. Bodkin, all of Los Angeles, amici curiæ.

LANGDON, Justice.

This is an action by the Superintendent of Banks to enforce an assessment against stockholders of an insolvent bank, pursuant to the provisions of the California Bank Stockholders' Liability Act, St.1931, p. 338, Deering's Gen.Laws, Act 652a.

The Firestone Park Bank was closed on January 7, 1932, and on that date the Superintendent of Banks took over its assets and management for purposes of liquidation. On January 28, 1932, in accordance with the statutory authority given him, he determined that it was necessary for payment of the debts to "enforce the individual liability of the stockholders" of the bank by an assessment of $100 per share. The order for assessment was then made, specifying March 7, 1932, as the date when the same should become due and payable. Defendants having failed to pay, the superintendent commenced this action on February 8, 1935, in the superior court. Defendants demurred, setting up the bar of the statute of limitations, and the trial court sustained the demurrer and dismissed the action. From the judgment of dismissal this appeal was taken by the superintendent.

The single issue before us is whether the action is barred by the statute of limitations, and, as will hereinafter appear, the precise question is when the statute began to run on the liability of defendants.

The Bank Stockholders Liability Act, which establishes the obligation, makes the general statement in section 1, p. 338, that the stockholders "shall be held individually liable, equally and ratably * * * for all contracts, debts and engagements of such corporation." It is further provided, section 2, p. 339, that the Superintendent of Banks may determine the necessity of an assessment, and may levy and call for the same. It then states: "If any stockholder of any bank shall fail to pay said assessment in full upon the date specified in said order as the date upon which said assessment shall be due and payable, a right of action shall immediately accrue to the superintendent of banks to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay the assessment in full."

This act does not contain a special statute of limitations. Accordingly, we turn to the Code of Civil Procedure for the applicable time limitation. Section 359 provides: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." This statute is the only one which by its terms covers the liability of stockholders of a corporation for its debts. The liability involved in this action clearly comes within the language of the section, which has heretofore been applied by this court to suits to enforce bank stockholders' liability originating under the laws of other jurisdictions. See Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Miller v. Lane, 160 Cal. 90, 116 P. 58. Its applicability was assumed in a recent decision of the District Court of Appeal dealing with stockholders of an insolvent bank under the New York law, Broderick v. Kunde, 74 P.2d 333, and expressly held applicable in an action against stockholders of an Oklahoma national bank, in Johnson v. Greene, 9 Cir., 88 F.2d 683. We therefore hold that section 359 is the governing statute of limitations, and we shall briefly notice hereinafter the argument of plaintiff that it has been repealed by implication.

In determining the effect of section 359 on the action before us, we may note that there are three possible dates upon which the statute may have begun to run: (1) The date upon which the banking corporation incurred the debt or debts which made necessary the present assessment. (2) The date upon which the assessment was levied (January 28, 1932). (3) The date upon which the assessment was due and payable (March 7, 1932). If either of the first two dates applies, the action was barred. But it was filed within three years after the due date of the assessment, and if that was the date upon which the statute of limitations began to run, the action was timely. This last date would apply under the usual statute of limitations, following the almost universal rule that it does not begin to run unless there is a cause of action to be barred; in other words, until the cause of action accrues. And this result is generally reached in cases from other jurisdictions involving the liability of stockholders of national and state banks, where the nature of the liability is essentially the same as our own. See Broderick v. Aaron, 151 Misc. 516, 272 N.Y.S. 219; Broderick v. Adamson, 148 Misc. 353, 265 N.Y.S. 804; Deweese v.

Smith, 8 Cir., 106 F. 438, 66 L.R.A. 971; McClaine v. Rankin, 197 U.S. 154, 25 S.Ct. 410, 49 L.Ed. 702, 3 Ann.Cas. 500; Broderick v. Kunde, supra.

But the above decisions, while concerned with bank stockholders' liability statutes similar to ours, did not involve statutes of limitation comparable to section 359 of the Code of Civil Procedure. This peculiar statute differs from the usual provision elsewhere, and from other provisions in our own Code, in that it requires the bringing of the action within three years after the liability "was created," instead of three years after the cause of action accrued. The interpretation of the section has been settled by a long line of cases which, construing the language literally, have held that actions are barred within three years after the obligation was incurred. As applied to our former unlimited proportional stockholders' liability, the extraordinary result followed that if a corporation borrowed money on a four-year promissory note, the obligation was incurred, and the stockholders' liability arose on the making of the note; three years afterwards the statute of limitations had run and the action was barred, though the cause of action itself had not even accrued. See Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87; Gardiner v. Royer, 167 Cal. 238, 139 P. 75. Severe criticism has been directed at this anomalous rule (see Gardiner v. Royer, supra; 7 Cal.L.Rev. 346), but as far back as 1914 this court considered the question finally settled by the decisions and declined to review it. Gardiner v. Royer, supra. Though our entire substantive law on corporations has been revised in recent years, section 359 has remained unamended, and we must accept the interpretations set forth above, establishing the distinction between creation of the liability and accrual of the cause of action, as the present meaning of the statute.

It would appear, then, that the statute began to run either at the time the debts of the bank were incurred, or at the time the assessment was levied, for on one of these dates the liability was certainly "created" within the meaning of section 359, regardless of whether it was immediately enforceable by action. But plaintiff advances two arguments against this view, which may be briefly considered.

[1-4] The first is that the adoption of the bank stockholders' liability statute repealed by implication the provisions of section 359 in so far as they apply to the liabilities of such stockholders. There is no merit in this contention, for the new statute, though it establishes the liability and provides a procedure for enforcement thereof, makes no reference to the time within which the action must be brought. Hence the provisions of the Code of Civil Procedure dealing with the commencement of actions must govern. Plaintiff would have us ignore section 359, which in express terms refers to liability of "stockholders of a corporation," and choose such sections as section 338, as amended by St.1935, p. 1673, referring generally to "liability created by statute," or section 343, covering actions not otherwise provided for, both of which are conventional in form, i. e., they start to run only upon the accrual of the cause of action. Under such a theory, however, any change in a substantive liability might be deemed to supersede an unrepealed limitation provision. There is no warrant for this kind of statutory construction, and bearing in mind the strong presumption against repeals by implication (see Penziner v. West American Finance Co., Cal.Sup., 74 P.2d 252), we conclude that section 359 is still in force, and applicable to such liability of corporation stockholders as the general statutes may establish, unless a specific limitation is prescribed for any particular liability, or the provisions of section 359 are expressly negatived.

The second contention is that the holding of the cases interpreting section 359 was based upon the unusual stockholders' liability in force prior to the revisions of 1930 and 1931, and that the different type of liability established by the new statute requires a different holding as to when the statute of limitations begins to run. We agree with this contention in part, but not to the extent urged by plaintiff. A brief comparison of the two kinds of liability at this point will clarify the issue.

The former liability was direct, primary, and unlimited, though in proportion to the shares of the stockholder. The creditor did not have to proceed first against the corporation, but could sue the stockholders directly, irrespective of solvency of the corporation. See Gardiner v. Bank of Napa, 160 Cal. 577, 117 P. 667; Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335; Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191; 15 Cal.L.Rev. 240; 5 Cal.L.Rev.

248. In the case of banking corporations, the creditors and not the Superintendent of Banks had the right to enforce the liability. Williams v. Carver, 171 Cal. 658, 154 P. 472. It was this direct character of the liability which gave rise to the rule that it was "created" when the debt of the corporation was incurred.

[5, 6] The liability of bank stockholders under our present law, similar to that in force under the National Bank Act, 12 U.S.C.A. § 63, and the state laws of many other jurisdictions, bears no resemblance to the former one. The present liability is limited in amount to the par value of the shares of the stockholder, and is indirect and contingent. The creditor has no right of action unless the corporation is insolvent, and then has no direct remedy against the stockholder. He must present his claim to the Superintendent of Banks, and it is enforced by the Superintendent. The stockholders' liability is not measured by the amount of the creditor's claim, as under the old law, but by the amount of the assessment levied by the superintendent. The stockholder is under no obligation to pay unless and until the superintendent has determined the necessity for an assessment, fixed the amount thereof and specified the due date. The cause of action is given to the superintendent, and on default he brings the action. The liability of the stockholder is not for the corporation debt, but for the assessment; and it is not to the creditor, but to the bank superintendent, a state administrative officer. This liability is not "created" when the corporation incurs the debt, nor even when the corporation becomes insolvent; it does not exist at all prior to the making of the assessment. It follows that our former decisions holding that the statute begins to run when the corporation incurs the debt cannot be controlling in the case of the completely different liability established by the present statute. In other words, the liability is not "created" when the bank becomes indebted to the creditor.

[7] But this does not mean that the statute will not run until the cause of action accrues. Section 359 still applies, and under its provisions the statute commences to run when the liability is created. We must therefore determine when the liability for the assessment was created. In our opinion, there can be no doubt that it was created when the assessment was levied, though the cause of action did not accrue until a short time afterward. The possibility of liability which confronted the bank stockholder when the bank failed became a certainty when the assessment was levied. The nature and amount of the assessment, the duty to pay it, and its time for payment were then fixed. To say that no liability was then created is to ignore the distinction between the creation of the liability and the accrual of the cause of action to enforce it, laid down in the decisions construing section 359, for the action applies "independent of any question as to whether that 'liability' is absolute or contingent or as to when the right to enforce it may accrue." Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, 941.

This conclusion, that under our section 359 the time begins to run when the assessment is made, was directly held in Johnson v. Greene, 88 F.2d 683, by the Circuit Court of Appeals of the Ninth Circuit, affirming the District Court decision, 14 F.Supp. 945. The case dealt with liability under the National Bank Act, 12 U.S.C.A. § 63, which is substantially the same as that established by our own law. We are in accord with the views expressed in this case, and the contrary holding in Broderick v. Kunde, supra, must be disapproved.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; CURTIS, J.; SEAWELL, J.

11 Cal.2d 774

RICHARDSON, Superintendent of Banks, v. BUSBY et al.

L. A. 16528.

Supreme Court of California.

April 4, 1938.

Rehearing Denied May 4, 1938.

1. Limitation of actions 🔑58(5)

The statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created" begins to run on action to enforce statutory assessment against stockholders of insolvent bank when assessment is levied, and not when bank incurs debt for which assessment is levied, or when assessment becomes due. St.1931, p. 338; Code Civ.Proc. § 359.

2. Limitation of actions 🔑58(5)

Where statutory assessment against stockholders of insolvent bank was levied May 21, 1932, action on assessment, instituted June 11, 1935, was barred by statute requiring actions against corporate directors to enforce liability created by law to be brought within three years after liability is "created," since limitation began to run when assessment was levied. St.1931, p. 338; Code Civ.Proc. § 359.

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In Bank.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Friend W. Richardson, as State Superintendent of Banks, against L. C. Busby and others, to enforce an assessment against defendants as stockholders of an insolvent bank. From a judgment for defendants, plaintiff appeals. Affirmed.

John G. Clock, and Clock, McWhinney & Clock, all of Long Beach, and Walter Desmond, of Los Angeles, for appellant.

Henry G. Bodkin, J. L. Fleming, and Leonard Comegys, all of Los Angeles, for respondents.

PER CURIAM.

This is an action against stockholders of an insolvent bank to recover on an assessment levied by the Superintendent of Banks pursuant to the terms of the Bank Stockholders' Liability Act, St.1931, p. 338, Deering's Gen.Laws, Act 652a. The assessment was levied on May 21, 1932. This action was commenced on June 11, 1935. The lower court held that the suit was barred by the statute of limitations, and plaintiff appealed.

[1, 2] In Richardson v. Craig, 77 P.2d 1077, this day filed, the same issue was presented as in the instant case, and we there held that the three-year period prescribed by section 359 of the Code of Civil Procedure began to run from the time the assessment was levied. On the authority of said case, the judgment herein is affirmed.

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11 Cal.2d 775

RICHARDSON, Superintendent of Banks, v. BARNUM et al.

L. A. 16534.

Supreme Court of California.

April 4, 1938.

Rehearing Denied May 4, 1938.

1. Limitation of actions 🔑58(5)

The statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created" begins to run on action to enforce statutory assessment against stockholders of insolvent bank when assessment is levied, and not when bank incurs debt for which assessment is levied, or when assessment becomes due. St. 1931, p. 338; Code Civ.Proc. § 359.

2. Limitation of actions 🔑58(5)

Where statutory assessment against stockholders of insolvent bank was levied April 7, 1932, action on assessment, instituted May 17, 1935, was barred by statute requiring actions against corporate stockholders to enforce liability created by law to be brought within three years after liability is "created," since limitation began to run when assessment was levied. St.1931, p. 338; Code Civ.Proc. § 359.

◆

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Friend W. Richardson, as State Superintendent of Banks, against E. E. Barnum and others to enforce an assessment against defendants as stockholders of an insolvent bank. From a judgment for defendants, plaintiff appeals.

Affirmed.

John G. Clock and Clock, McWhinney & Clock, all of Long Beach, for appellant.

Duckworth & Harrison, Surr & Hellyer, Wilson & Coughlin, and Robert Mack Light, all of San Bernardino, for respondent.

PER CURIAM.

This is an action to enforce the liability of stockholders of an insolvent bank on an assessment levied by the Superintendent of Banks pursuant to the terms of the Bank Stockholders' Liability Act, St.1931, p. 338, Deering's Gen.Laws, Act 652a. The assessment was levied April 7, 1932. The action was commenced on May 17, 1935. The lower court sustained a demurrer to the complaint, holding that it was barred by the statute of limitations. Plaintiff appealed.

[1, 2] In Richardson v. Craig, 77 P.2d 1077, this day filed, the same issue was presented as in the instant case, and we there held that the three-year period prescribed by section 359 of the Code of Civil Procedure began to run from the time the assessment was levied. On the authority of said case, the judgment is affirmed.

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11 Cal.2d 89

In re HART'S ESTATE.

DARLINGTON v. HART et al.

L. A. 15913.

Supreme Court of California.

March 31, 1938.

1. Appeal and error 🔑1017

Under statute governing powers of referee, referee's findings are findings of court and reviewable in like manner. Code Civ. Proc. § 638, as amended by St.1933, p. 1877.

2. Reference 🔑24

A referee may exercise statutory powers by order of court on agreement of parties filed with clerk or entered in the minutes. Code Civ.Proc. § 638, as amended by St.1933, p. 1877.

3. Reference 🔑34

Under minute order showing case was "Referred" to named officer, where such officer discussed legal issues and his intention to rule thereon, heard arguments of law, agreed to accept briefs, stated he was a referee, and adopted findings of one party after both parties participated in hearing and submitted findings, party whose findings were rejected could not claim right to argue exceptions to such officer's report on ground that he was a court commissioner and not a referee, since, if such party did not consent to reference, objection thereto was waived. Code Civ.Proc. § 259a; § 638, as amended by St.1933, p. 1877.

4. Appeal and error 🔑924

Under minute order showing case was "Referred" to named officer, and under final judgment adopting "referee's Report," where such officer discussed legal issues and his intention to rule thereon, heard arguments of law, agreed to accept briefs, stated he was a referee, and adopted findings of one party after both parties participated in hearing and submitted findings, presumption obtained that such officer was a "referee" and not a "court commissioner," and hence party whose findings were rejected had no statutory right to argue exceptions to report. Code Civ.Proc. § 259a; § 638, as amended by St.1933, p. 1877.

[Ed. Note.—For other definitions of "Referee," see Words & Phrases.]

5. Appeal and error 🔑662(2)

Where judgment of trial court recites the fact of reference, such recital, though not conclusive on direct attack by appeal, is presumed correct, and must be accepted as true in absence of strong contrary showing. Code Civ.Proc. § 638, as amended by St.1933, p. 1877.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Proceeding in the matter of the estate of Jennie D. Hart, deceased, on the account of Barton Darlington, executor, wherein exceptions and objections were filed by Francis D. Hart and another. From an adverse order, the executor appeals.

Affirmed.

For prior opinion, see 70 P.2d 539.

John E. Carson and William G. Randall, both of Los Angeles, for appellant.

Euler & Subith and B. R. Ware, all of Los Angeles, for respondents.

LANGDON, Justice.

This is an appeal from an order settling the final account of an executor and ordering distribution. The principal issue is whether the matter was heard by J. W. Mullin, Jr., as a referee or merely as a court commissioner.

Appellant Darlington, executor of the will, filed his first and final account, report, and petition for distribution. Respondents Francis and Richard Hart served and filed separate exceptions and objections. Appellant answered and the hearing was set for November 14, 1935, and continued to November 29, 1935. At this time the matter was referred to Mr. Mullin, a court commissioner. A full hearing was had, and a number of witnesses were examined. Findings were prepared by counsel for respondent Francis Hart, properly served and filed, and on January 20, 1936, Mr. Mullin wrote counsel that the order of the court adopting his findings and conclusions as referee would be adopted by the court on January 29, unless additions or exceptions were received prior thereto. Counsel for appellant executor prepared alternative findings, which were filed January 29. On February 5, said counsel wrote Mr. Mullin, stating that he desired to exercise rights under section 259a of the Code of Civil Procedure, in particular to except to the commissioner's report and argue his exceptions before the court. Thereafter Mr. Mullin's report, findings, and conclusions of law were filed, and adopted by order of the court, which rendered judgment thereon.

The issue raised by the appeal is a simple one. The powers of a court commissioner are limited, and under section 259a of the Code of Civil Procedure any party to a contested proceeding heard before such commissioner has a right to argue exceptions before the court after notice of motion given. If Mr. Mullin held this hearing as a court commissioner, the statutory rights of appellant were concededly violated, and the judgment cannot stand.

[1] The position of respondents, however, is that Mr. Mullin heard the matter as a referee, under the voluntary reference provisions of the Code of Civil Procedure, §§ 638–645, as amended by St. 1933, pp. 1877, 1878. A referee is authorized by section 638 "to try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon." His findings are the findings of the court, and reviewable in like manner. If Mr. Mullin acted in this case as referee, the procedure was in accordance with law, and appellant's claim is untenable.

[2, 3] A referee may exercise these statutory powers by order of the court, upon agreement of the parties filed with the clerk or entered in the minutes. The record before us is not as full as it might be, and there is some uncertainty as to what was actually intended by the parties, but we think the circumstances are such that the uncertainty must be resolved in favor of the judgment. The minutes of the clerk, on January 9, 1936, contain the statement with respect to this cause: "Referred to J. W. Mullin, Jr." During the hearing Mr. Mullin repeatedly discussed the legal issues involved, and his intention to rule thereon. Counsel for appellant sought leave to brief the matter, and Mr. Mullin stated that he would appreciate any brief on the law. The parties argued the law before him. At the conclusion of the hearing Mr. Mullin said, in the course of remarks concerning which was the proper party to prepare findings: "while I am hearing it as a referee, and must make a finding to the court," adding that he did not think findings would be waived. He discussed his views on the issues again at this time, and thereafter both sides prepared proposed findings and submitted them to him, whereupon he adopted those of respondents and rejected those of appellant. The judgment of the court, entitled "Order of Court adopting referee's Report," recites that J. W. Mullin, Jr., was appointed referee to hear and determine the issue set out in said report. While the original minute order of reference was so brief as perhaps to be uncertain, the subsequent developments must necessarily have made clear to appellant that Mr. Mullin was acting as a referee, and if in fact there was no agreement of reference, it is most extraordinary that no point was made as to this until after adverse findings were clearly indicated. The participation in the hearing and subsequent consideration of the case, with knowledge of Mr. Mullin's statements, is indicative either of a prior consent to the reference or a waiver of objection thereto. See Garland v. Smith, 131 Cal.App. 517, 21 P.2d 688; Shain v. Peterson, 99 Cal. 486, 33 P. 1085.

[4, 5] Moreover, the judgment of the lower court herein recites the fact of reference, and this recital, though not conclusive on a direct attack by appeal, is presumed to be correct. In the absence of a strong showing to controvert it, and there is no affirmative evidence in the record which does so, it must be accepted as true. See Sichler v. Look, 93 Cal. 600, 29 P. 220.

The findings are supported by the record, and no points raised in connection therewith require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.

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11 Cal.2d 92

MEYERS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

L. A. 16461.

Supreme Court of California.

March 31, 1938.

Rehearing Denied April 28, 1938.

1. Subrogation 🔑31(1)

An assignment of an assignable cause of action is a form of "subrogation," and hence, when by virtue of subrogation one is entitled to substitution in the place of one entitled to sue, neither a written nor oral contract is necessary to effect transfer of such right and formal written assignment of claims adds nothing to enforceability of cause of action by assignee.

[Ed. Note.—For other definitions of "Subrogation," see Words & Phrases.]

2. Assignments 🔑100

An action by the assignee of an assignable cause of action is subject to the same defenses as though no assignment thereof had been made.

3. Subrogation 🔑31(5)

Although a creditor may assign rights and remedies to surety, where surety is entitled to be subrogated completion of subrogation and right of surety to pursue rights and remedies of creditor is not dependent on assignment, since, in equity, surety's payment causes assignment by operation of law and no formal assignment or transfer is necessary.

4. Subrogation 🔑31(1)

Where surety is not entitled to subrogation, an assignment by the creditor will be ineffectual to give surety right of subrogation he otherwise would not have.

5. Subrogation 🔑31(1)

A person who asserts a right of subrogation, whether by virtue of assignment or otherwise, must first show right in equity to be entitled to such subrogation, and, where such right is clearly shown by application of equitable principles, assignment adds nothing to the right.

6. Subrogation 🔑31(1)

Where, by application of equitable principles, surety had been found not to be entitled to subrogation, assignment will not confer on him right to be so substituted in action at law on assignment.

7. Subrogation 🔑31(1)

The right of a surety to be subrogated to rights of creditor must be measured by application of equitable principles, and not on asserted legal right under assignment.

8. Insurance 🔑606(5)

Where employee had negotiated embezzled check to third person who deposited check with bank which received payment from drawee, employer was not entitled, by subrogation, to maintain action against bank and third person in behalf of insurer by which employer had been indemnified and to which employer had assigned his rights, since, in equity, satisfaction of insurer's primary liability did not entitle it to recover against bank which was innocent in transaction in which it sustained a liability totally different from that of insurer.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by A. Meyers, doing business as Western Transportation Company, against the Bank of America National Trust & Savings Association and another for damage occasioned by defendant bank's cashing of check on which indorsement of plaintiff had been forged. Judgment for plaintiff, and defendants appeal.

Reversed.

For prior opinion, see 69 P.2d 868.

Willedd Andrews, of Los Angeles, for appellant F. C. Wascher, doing business under the fictitious firm name and style of Uptown Drug Co.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant Bank of America Nat. Trust & Savings Ass'n.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondent.

PER CURIAM.

From the record herein it appears that in the course of the conduct of the business in which plaintiff was engaged, on each of numerous occasions his office manager received certain checks which theretofore had been made payable to plaintiff; that thereupon plaintiff's said office manager forged upon them the name of the payee and negotiated them with defendant Wascher, who paid full value therefor; that plaintiff's said manager wrongfully converted the value of said checks to his own use; that upon such receipt of said checks, in the ordinary course of his business, defendant Wascher deposited them in his bank account with the defendant bank, which thereafter presented them to the respective drawees thereof, and received full payment therefor. It also appears that at and during all the times in question plaintiff was indemnified against damage which might result from the wrongful acts of his office manager by a bond which theretofore had been executed by United States Guarantee Company and that following the discovery of said manager's dishonesty in the premises, the bond company reimbursed plaintiff for the loss which thus had been sustained by him. At the same time plaintiff assigned to the bond company any cause of action of which he then was the owner as against the defendant bank, together with the right to maintain an action at law thereon in the name of plaintiff. Acting in behalf of the assignee, plaintiff brought this action. In pursuance of the commencement and prosecution of such action, a judgment was rendered in favor of plaintiff, and it is from such judgment that the instant appeal is presented to this court.

On the part of appellant bank, in effect, it is contended that whatever right plaintiff's assignee may have had to maintain an action against the defendants, ultimately, if at all, its success must have depended upon an application of the doctrine of subrogation. On the other hand, respondent insistently urges the point that since originally he was the owner of an assignable cause of action against the defendant bank, he also had the legal right to assign it to his indemnitor; furthermore, that because both the right of action and its assignment were legal in their nature, the action was one at law, with the necessary consequence that the equitable doctrine of subrogation was inapplicable.

[1, 2] In that regard, at the outset, it should be noted that assignment of an assignable cause of action is but one of the recognized forms of subrogation, and that when entitled to substitution in the place of one entitled to institute and to maintain an action, neither a written nor an oral contract is necessary to effect a transfer of such right; consequently, with reference thereto repeatedly it has been ruled not only that a formal, written assignment of a claim of the nature of that here involved adds nothing to the enforceability by the assignee of the cause of action, but also that it is subject to the same defenses as though no assignment thereof of any sort had been made. Notwithstanding that principle of law, with respect to the factual situation hereinbefore set forth, great reliance is placed by respondent in the ruling announced in the analogous case of Grubnau v. Centennial National Bank, 279 Pa. 501, 124 A. 142, 143, that (syllabus): "Where an insurance company had paid a loss resulting to insured from the forgery of checks on its deposit at a bank, and had taken an assignment of its cause of action against the bank there was no subrogation wherein the equities of the bank could be said to exceed those of the insurer."

Nor, in that regard, may it be said that the legal principle there declared is out of harmony with other precedents of like nature, as may be noted on consideration of the following authorities cited by respondent: Metropolitan Casualty Ins. Co. v. First Nat. Bank in Detroit, 261 Mich. 450, 246 N.W. 178; Offer v. Superior Court, 194 Cal. 114, 228 P. 11; Estate of Elizalde, 182 Cal. 427, 188 P. 560; Title Guaranty, etc., Co. v. Duarte, 54 Cal.App. 260, 201 P. 790; Martin v. Federal Surety Company, 8 Cir., 58 F.2d 79; First & Tri State Nat. Bank & Trust Co. v. Mass. Bonding & Ins. Co., 102 Ind.App. 361, 200 N.E. 449, and Nat. Surety Co. v. Bankers' Trust Co., 210 Iowa 323, 228 N.W. 635.

But in appellants' behalf, especially with reference to the foundation upon which in an action of this character, a right of a substituted plaintiff to maintain a suit for the recovery of damages originally suffered by another must rest, appellants have directed the attention of this court to a line of cases which in their legal effect is wholly at variance with those to which reference hereinbefore has been had.

[3, 4] However, before proceeding to a consideration of the pertinent authorities, a statement that occurs in 60 C.J., p. 749, with reference thereto should be noted, to-wit: "While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is *entitled* to be subrogated, the completion of the surety's subrogation, and his right to pursue the rights and remedies of the creditor, is not dependent on the willingness of the latter to make an assignment, *for in equity the surety's payment causes an assignment by operation of law and no formal assignment or transfer is necessary.* On the other hand, it seems that, if the surety is *not entitled to subrogation,* an assignment by the creditor will be ineffectual to give the surety a right of subrogation he would not otherwise have." (Italics added.)

Illustrative of that rule, is the case of American Surety Co. of N. Y. v. Lewis State Bank, 5 Cir., 58 F.2d 559, 560, wherein suit was brought against the bank by the surety on a state game commissioner's bond, to recover by right of subrogation for the payment of warrants fraudulently drawn by its principal to fictitious payees. After the surety had paid the state the amounts of the moneys thus converted, it took an assignment, or "subrogation agreement," to all actions which the state had against the defaulter or any third person answerable to the former or to the state. The contention was made that the suit was one in the right of its assignor, the state of Florida, which could not have maintained the suit in the federal court. In holding this contention to be without merit the court said: "The cause of action asserted here is one in equity for subrogation, *not at law upon the assignment.* * * * It [subrogation] is properly applied in favor of a surety on a fidelity bond *only against persons who have participated in the wrong of its principal.* * * * *It is never applied against an innocent person wronged by the principal's fraud.*" (Italics added.)

In the case of American Bonding Co. of Baltimore v. State Savings Bank, 47 Mont. 332, 133 P. 367, 368, 46 L.R.A.,N.S., 557, the facts of which were analogous to those presented here, after a county had recovered against a surety for defalcations of its principal, the surety took an assignment of any right of action which the county might have had against the bank, and sought recovery against the latter. The court there said: "At law this surety company would not have any right of action against the bank; but, to state a cause of action at all, it must allege such facts as *will appeal to the conscience of a court of equity.*" (Italics added.)

Likewise, in the case of Louisville Trust Co. v. Royal Indemnity Co., 230 Ky. 482, 20 S.W.2d 71, hereinafter referred to, the court there said: "We do not regard the assignment taken some time after the indemnity company had discharged its obligation as *adding* anything to the surety's right of action against the trust company. * * * In the circumstances, its case *depends altogether on the doctrine of subrogation,* which is essentially a creature of equity." (Italics added.)

[5-7] Under these cases the conclusion seems inevitable that one who asserts a right of subrogation, whether by virtue of an assignment or otherwise, must first show a *right in equity* to be entitled to such subrogation, or substitution, and that where such right is clearly shown by the application of equitable principles, an assignment adds nothing to his right thereto. Otherwise stated, where by the application of equitable principles, a surety has been found not to be entitled to subrogation, an assignment will not confer upon him the right to be so substituted in an action at law upon the assignment. His rights must be measured by the application of equitable principles in the first instance, his recovery being dependable upon a right in equity, and not by virtue of an asserted legal right under an assignment. With these conclusions as a premise, we shall proceed to an examination of the line of cases relied upon by appellant bank as authority for its contention that in equity respondent has no right of subrogation under the facts of this case.

In the case of New York Title & Mortgage Co. v. First National Bank, 8 Cir., 51

F.2d 485, 487, 77 A.L.R. 1052, a loan broker, through forgeries and misrepresentations, procured title insurance policies, by which a loan association was guaranteed against loss by reason of defects in the mortgagor's title to realty described in mortgages or deeds of trust by which certain loans were secured. In each case, the purported borrower was a fictitious person. In that connection, upon his receipt of a check from the loan association, the broker forged the name of the payee thereof, deposited it in the drawee bank, and converted the proceeds to his own use. The bank, after paying such check, charged the amount thereof to the account of the loan company. The title insurer paid the loss to the loan company and brought suit against the bank for the total amount so paid. In that case the court pointed out that there were two independent contracts involved, the one being that the bank would not pay the checks of its depositor upon forged indorsements, and the other, that existing between the loan company and the plaintiff indemnitor. The court said: "Plaintiff's payment to the loan company was a discharge of its primary contract liability. * * * [It] paid the loan company only what it contracted primarily to do, but now, retaining the premiums or benefit of its contract, it seeks reimbursement from the bank, on the theory that the bank, under a wholly separate and independent contract, was liable to the loan company for having paid checks on forged indorsements. * * * If we assume that neither the plaintiff nor the bank was the wrongdoer, but, by independent contract obligation, each was liable to the loan company, then the satisfaction of such primary liability by the plaintiff would not give rise to a right to recover against the bank under the doctrine of subrogation, the bank not being a wrongdoer [citing cases]. But if there were any doubt as to the soundness of this position, we think it clear that plaintiff is not entitled to invoke the remedy of subrogation, because that right is an equitable one, and is applicable in cases in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. It is the method which equity employs to require the payment of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. It cannot, as a matter of right, be invoked in all cases without regard to circumstances, but only in cases in which *justice demands its application,* and the rights of one asking subrogation must have a greater equity than those who oppose him. As said by this court in American Surety Co. v. Citizens' Nat. Bank, [8 Cir.] 294 F. 609: 'The right of subrogation is an equitable right, and where equities are equal the right does not exist and there can be no relief.'" After commenting upon the fact that the bank had been guilty of no negligence in the transactions involved, the court stated that "the primary cause of plaintiff's loss was the *forgeries committed by Smith*" (the loan broker), and that: "Here, * * * the bank paid the checks on which the indorsements were forged, without negligence, and the circumstances surrounding the transactions involved do not give rise to any superior equities in favor of the plaintiff; nor can it be said that in good conscience the defendant bank ought to stand the loss. * * * In our view, the equities in favor of the defendant bank constitute an *insuperable barrier* to plaintiff's right of recovery." (Italics added.)

In the case of Louisville Trust Co. v. Royal Indemnity Co., 230 Ky. 482, 20 S.W. 2d 71, an employer recovered on a fidelity bond because of an employee's misappropriation of checks of the former by depositing them to his own credit in a trust company. The employer assigned its claim against the trust company to its surety. There the court said: *"We do not regard the assignment taken some time after the indemnity company had discharged its obligation as adding anything to the surety's right of action against the trust company.* Godfrey v. Alcorn, 215 Ky. 465, 284 S.W. 1094, 51 A.L.R. 925. *In the circumstances, its case depends altogether on the doctrine of subrogation,* which is essentially a creature of equity, and is called into play only when it is necessary to bring about an *equitable adjustment* between the parties. * * * The case is one between a paid surety and the trust company, whose negligence it is claimed caused the loss. It must be conceded that the rule that makes the trust company liable to the [employer] is to say the least, a hard one. * * * Therefore, as between the employer and the bank, there is much to be said in favor of the position that the loss should fall on the employer who selects an unfaithful agent, and thus vouches for his integrity, rather than on the bank whose officers in many instances are called upon daily to examine and keep account of a large number of checks, a duty which, to say the least, operates as a severe strain on ordinary care. Though the rule as between the bank and the employer is settled, yet, in view of its extreme harshness, we are not inclined to go further and hold that *the equities of a surety that has been paid to bear the loss are superior to those of the bank that receives no benefit from the transaction.*" (Italics added.)

In Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265, 268, 4 A.L.R. 510, the Supreme Court of Minnesota had before it a case factually similar to the facts in the instant matter, and which involved the question of subrogation, wherein it stated: "When it is sought to enforce the right [of subrogation], *something more must be shown than that defendant could have been compelled by the original creditor to pay the debt.* While a surety may assert the right against one with whom he had no contractual relations, *it must appear that the defendant participated, with notice,* in the illegal act of the principal which served to bring about the loss. The right to recover *from a third person* does not stand on the same footing as the right to recover from the principal. As to the latter, the right is absolute—as to the former it is conditional." (Italics added.)

In the case of American Bonding Co. v. State Savings Bank, 47 Mont. 332, 133 P. 367, 368, 46 L.R.A.,N.S., 557, a court clerk manufactured jury certificates and sold them to the bank. The county took up the certificates and paid the bank without having discovered the fraud. The surety company on the clerk's bond made the loss good and then sued the bank. It was held that although the county could have recovered from the bank, as between the surety company and the bank the equities were at least equal and that the bank was not liable to the surety. There the court said: "The doctrine of subrogation had its origin in the civil law. It has been adopted and invoked by courts of equity in order that justice may be done as nearly as possible. The application of the doctrine must therefore depend upon the circumstances of each particular case. * * * There is not any charge of negligence or wrongdoing on the part of the bank in purchasing the certificates. * * * Some one must suffer now for Farrell's official misconduct. Shall it be the bank, which acted in good faith and parted with its money for the spurious certificates issued by Farrell, or shall it be the surety company which for a compensation undertook to be responsible for Farrell's official delinquencies, not only to the state and to Silver Bow county, but to this bank as well? To such an inquiry a court of conscience can make but one answer. Upon the showing made in its complaint, the surety company has failed to show itself entitled to be subrogated to the right which the county may have had." It was there stated that the weight of authority supported the view taken by the court.

In the case of Washington Mechanics' Savings Bank v. District Title Ins. Co., 62 App.D.C. 194, 65 F.2d 827, 830, wherein the facts were analogous to those here presented, except that there the check was stolen by the employee of the drawer before delivery and deposited by the employee to his own account with the defendant bank, who in turn paid out money for the deposit thereof, it was held that the bonding company could not be subrogated. The court in that case said: "We are unable to see any particular in which the equities of the bonding company are superior to those of the appellant bank. Neither one was guilty of culpable negligence in the transaction. The bonding company, being in the business of guaranteeing for a consideration the faithful conduct of employees, enabled the defaulting employee to hold the position of trust which he occupied. The appellant bank was acting consistently with the ordinary course of banking business in accepting a check, whose genuineness it had no reason to doubt. It cannot be said that either one of these parties, as compared with the other, was primarily liable for the default. It follows that the equities of neither are superior to the equities of the other in the transaction."

Also in Estate of Whitney, 124 Cal.App. 109, 11 P.2d 1107, 1110, one of two cotrustees of a testamentary trust, both of whom were bonded, wrongfully appropriated to himself funds of the trust estate without the knowledge of his cotrustee. Both trustees had an interest individually in the trust estate. The bonding company paid the loss, charged one-half to each bond, and asked to be subrogated to the claim of the estate against the innocent trustee and to have the interests of both trustees in the estate subjected to satisfaction of its claim. The court held that, although the innocent trustee was liable to the estate, the bonding company was not subrogated, and that its payment should have been charged wholly to the bond of the guilty trustee. In that case it was said: "While section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of his principal, is entitled to be subrogated to that extent to all remedies which the creditor has against the principal, the question whether the obligation which is satisfied is in fact the obligation of the particular principal is to be decided in accordance with the rules of law and principles of equity. As was said in Southern Surety Co. v. Tessum, 178 Minn. 495, 228 N.W. 326, 66 A.L.R. 1136: 'Subrogation is equity's second method of compelling the ultimate payment by one who in justice and good conscience *ought* to make it—of putting the charge where it justly belongs. Emmert v. Thompson, 49 Minn. 386, 52 N.W. 31, 32 Am.St. Rep. 566. It is not an absolute right, but depends upon the superiority of the equities of him who asserts it over those of the one against whom it is sought. "It will never be enforced when the equities are equal or the rights not clear."' "

To like effect is the case of American Surety Co. of New York v. Waggoner Nat. Bank, D.C., 13 F.Supp. 295, wherein a tax collector deposited tax receipts in the defendant bank to his own credit, from which he made withdrawals. Thereafter a shortage was discovered in his accounts, and suit was brought by his surety, who had paid the loss, against the defendant bank. It was held that the surety could not recover. The court in that case likewise recognized the weight of authority to be with the view that in the circumstances, there could be no subrogation of a surety.

And in the case of First & Tri State National Bank v. Mass. Bonding Co., 102 Ind.App. 361, 200 N.E. 449, 452, cited by respondent, the statement is made: "The doctrine [of subrogation] has been applied most frequently in the courts to certain types of insurance cases. It has with almost unanimity been held not to apply *in favor of surety on a fidelity bond,* except only against persons who participated in the wrongful act of the wrongdoer." See, also, National Surety Co. v. Arosin, 198 F. 605, 117 C.C.A. 313; Baker v. American Surety Co., 181 Iowa 634, 159 N.W. 1044; United States Fidelity & Guar. Co. v. Home Bank, 77 W.Va. 665, 88 S.E. 109; Emmert v. Thompson, 49 Minn. 386, 52 N.W. 31, 32 Am.St.Rep. 566; American Surety Co. of N. Y. v. Citizens' Nat. Bank of Roswell, 8 Cir., 294 F. 609; Stewart v. Commonwealth, 104 Ky. 489, 47 S.W. 332; Southern Surety Co. v. Tessum, 178 Minn. 495, 228 N.W. 326, 66 A.L.R. 1136, and American Bonding Co. v. First Nat. Bank, 85 S.W. 190, 27 Ky.Law Rep. 393. (Italics added.)

[8] Thus, it may be observed that there are two lines of cases governing the questions here presented, each wholly at variance with the other. We think the great weight of authority rests with the group last referred to, and that the principles there announced, in good conscience ought to be applied to the circumstances of this case. As stated hereinbefore, the right to maintain an action of this kind and to a recovery thereunder involves a consideration of, and must necessarily depend upon the respective equities of the parties. Here, the indemnitor has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. It now seeks to recover from the bank the amount thus paid. It must be conceded that the bank is an innocent third party, whose duty to the employer was based upon an entirely different theory of contract, with which the indemnitor was not in privity. Neither the indemnitor nor the bank was the wrongdoer, but by independent contract obligation each was liable to the employer. In equity, it cannot be said that the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank upon a totally different liability. The bank, not being a wrongdoer, but in the ordinary course of banking business, paid money upon these checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. The primary cause of the loss was the forgeries committed by the employee, whose integrity was at least impliedly vouched for by his employer to the bank. We cannot say that as between the bank and the paid indemnitor, the bank should stand the loss. Under the facts of this case, as is stated in Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265, 268, 4 A.L.R. 510: "The right to recover from a *third person* does not stand on the same footing as the right to recover from the *principal.*" (Italics added.)

Our conclusion, as hereinbefore has appeared, is that since the bonding company had no superior equities, it was not entitled to be subrogated to any claim plaintiff might have had against the bank.

The judgment is reversed.

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11 Cal.2d 103

FLACK v. BOLAND et al.

MACK v. SAME.

L. A. 15777.

Supreme Court of California.

April 1, 1938.

1. Limitation of actions 🔑48(7), 170

Although limitation does not run against power of sale in a trust deed, limitation applies to the commencement of action including action for foreclosure of mortgages, and in such case limitations commence to run on the maturity of obligation secured. Code Civ.Proc. § 335.

2. Limitation of actions 🔑167(2)

The defense of limitations, when supported by proper pleading and proof, operates not only to bar action on the debt, but also deprives mortgagee of right to enforce lien of his mortgage, since the mortgage is merely an incident to the principal obligation. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116.

3. Limitation of actions 🔑172

A subsequent mortgagee may invoke aid of limitation statute against a prior mortgagee, even though the mortgagor as between himself and prior mortgagee may have waived protection of limitation statute. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116.

4. Limitation of actions 🔑167(2)

The statute providing that a lien is extinguished by lapse of time within which action can be brought upon principal obligation applies to mortgage liens. Code Civ. Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; Civ.Code, § 2911.

5. Limitation of actions 🔑5(3)

The rules relating to defense of limitations in mortgage foreclosure action apply in actions to foreclose trust deeds. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; § 725a, re-enacted by St. 1935, p. 1807.

6. Limitation of actions 🔑170

The defense of statute of limitations is available in action to foreclose a deed of trust. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; § 725a, re-enacted by St.1935, p. 1807.

7. Limitation of actions 🔑172
Mortgages 🔑497(2)

A mortgagor's default in trust deed foreclosure action constituted waiver of mortgagor's right to defense of limitation, but did not prejudice rights of holder of junior trust deed who was entitled to assert such defense and, because of fact that limitations would constitute defense to prior mortgagee's foreclosure action, was entitled to have proceeds of sale of the property applied first to lien of holder of junior trust deed. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; § 725a, re-enacted by St.1935, p. 1807.

8. Election of remedies 🔑1

The doctrine of election of remedies proceeds on the theory that the claimant having two inconsistent remedies and having availed himself of one is estopped from also pursuing the other.

9. Mortgages 🔑337, 417

The holder of a trust deed, even before enactment of statute authorizing beneficiary or trustee named in trust deed securing realty to foreclose the trust deed in manner provided for mortgage foreclosure, could maintain an action to foreclose the trust deed and pendency of action in foreclosure was not a bar to foreclosure through trustee's sale. Code Civ.Proc. § 725a, re-enacted by St.1935, p. 1807.

10. Mortgages 🔑378

Where the holder of a trust deed institutes an action to foreclose and subsequently forecloses trust deed in form and procedure of trustee's sale, the pending foreclosure action can go forward after the trustee's sale for purpose of obtaining judgment for deficiency, especially where no question of limitation is involved. Code Civ. Proc. § 725a, re-enacted by St.1935, p. 1807.

11. Mortgages ⟹337

A mortgagee who foreclosed trust deed, and whose lien was declared to be subordinate to lien of a junior mortgagee because prior mortgagee's action was barred by limitation, could not complain because foreclosure action could not be dismissed because of cross-complaint filed by junior mortgagee, on ground that prior mortgagee, who had right to proceed by trustee's sale as well as by foreclosure under statute, was forced to elect remedy of foreclosure, since dismissal of foreclosure was not essential to pursuit of mortgagee's right to proceed by trustee's sale which was a right concurrent with his right to foreclose. Code Civ.Proc. § 335; § 337, subd. 1, as amended by St. 1933, p. 2116; § 725a, as re-enacted by St. 1935, p. 1807.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to foreclose a trust deed by Charles L. Flack, executor of the estate of Max Janka, deceased, against William F. Boland and others, wherein J. L. Mack filed a cross complaint to foreclose his trust deed. From the judgment foreclosing both trust deeds and granting priority to the trust deed of J. L. Mack, the plaintiff appeals, and from the judgment on the cross-complaint, the cross-defendants, William F. Boland and others, appeal.

Affirmed.

For prior opinion, see 69 P.2d 888.

H. R. Griffin, of San Bernardino, for appellants.

Robert Mack Light, of San Bernardino, for respondents.

SHENK, Justice.

This appeal on the judgment roll is taken by the plaintiff as executor of the estate of Max Janka, deceased. From this record it appears that the defendants Boland, on August 3, 1926, executed and delivered a promissory note for $1,500 to the decedent, payable three years after date, and secured the same by a trust deed on certain real property. On August 20, 1931, the defendants Boland executed and delivered to the defendant and cross-complainant Mack, another promissory note for $1,000, payable one year after date, and secured the same by a second trust deed on the same property.

On December 15, 1934, the plaintiff commenced an action to foreclose the trust deed given to Janka and joined Mack as a party defendant. The defendants Boland defaulted. The defendant Mack filed an answer in which he denied the allegation that the lien of his trust deed was subordinate to the plaintiff's lien and alleged that the plaintiff's cause of action was barred under subdivision 1 of section 337 of the Code of Civil Procedure, as amended by St.1933, p. 2116. Mack also filed a cross-complaint in which he sought to foreclose his trust deed and to have the plaintiff's claim subordinated to his claim and lien.

The court rendered its decree foreclosing both trust deeds and adjudging that the lien of the defendant and cross-complainant Mack was prior to the lien of the plaintiff. It was therefore ordered that upon the sale of the property the proceeds be applied, first, to satisfy the claim of the defendant and cross-complainant Mack; secondly, to satisfy the claim of the plaintiff; and, thirdly, that the surplus, if any, be paid to the defendants Boland.

It is conceded by the parties that the action to foreclose the plaintiff's trust deed and the cross-complaint to foreclose the Mack trust deed were brought pursuant to the provisions of section 725a added to the Code of Civil Procedure in 1933, p. 1669, re-enacted by St.1935, p. 1807. That section provides: "The beneficiary or the trustee named in a deed of trust upon real property or any interest therein to secure a debt or other obligation, shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property."

The first question presented on this appeal is whether the defense of the statute of limitations is available in an action to foreclose a deed of trust under section 725a, above quoted.

[1-3] Although the statute of limitations does not run against the power of sale in a deed of trust (Grant v. Burr, 54 Cal. 298; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232; Bank of Italy v. Bentley, 217 Cal. 644, 20 P.2d 940), the limitation of the statute does apply to the commencement of actions (section 335, Code Civ.Proc.), including actions for the foreclosure of mortgages, and commences to run upon the maturity of the obligation

secured (18 Cal.Jur. pp. 408–428, and cases there cited). The note is the principal obligation and the mortgage is an incident thereto. The plea of the statute is an answer to the merits and when supported by proper pleading and proof this defense operates not only to bar the action on the debt but also deprives the mortgagee of the right to enforce the lien of his mortgage. Lord v. Morris, 18 Cal. 482; Allen v. Allen, 95 Cal. 184, 30 P. 213, 16 L.R.A. 646; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279. And a subsequent mortgagee or attachment lienholder may invoke the aid of the statute against the mortgagee (Foster v. Butler, 164 Cal. 623, 130 P. 6; 18 Cal.Jur. p. 416), even though the mortgagor, as between himself and the mortgagee, may have waived its protection. Brandenstein v. Johnson, 140 Cal. 29, 73 P. 744.

[4] Furthermore, section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." There is no distinction in this respect between a mortgage lien and any other lien. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St.Rep. 75, 14 Ann.Cas. 844; Faxon v. All Persons, 166 Cal. 707, 715, 137 P. 919, L.R.A.1916B, 1209.

[5, 6] There appears to be no good reason why the foregoing rules should not be applied in an action to foreclose a deed of trust under section 725a of the Code of Civil Procedure. Indeed, the very language of section 725a would seem to admit of no other determination. A proceeding taken thereupon authorizes the foreclosure of a deed of trust "in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property."

[7] Therefore, applying the foregoing rules with reference to the foreclosure of mortgages to the foreclosure of the trust deeds in question, it would follow that if the defendants Boland had not defaulted but had answered, setting forth the defense of the statute of limitations, the plaintiff's foreclosure action would have been defeated, the plaintiff's lien declared to have been extinguished, with judgment in Bolands' favor. The Bolands could not, by their default, prevent the second incumbrancer Mack from interposing the same defense and compelling the same result so far as his lien was concerned. Their default constituted a waiver of the defense of the statute of limitations, which waiver, however, could not operate to the prejudice of Mack who was clothed under the circumstances with the defense available to but not asserted by the Bolands.

The trial court was therefore correct in holding that the plaintiff's right to foreclose as against Mack was barred by the statute of limitations and in ordering the foreclosure of his deed of trust with payment first to him from the proceeds of the sale.

[8-11] The plaintiff argues at length in support of his contention that he should not be barred from exercising his right to satisfy his claim by a trustee's sale and that the doctrine of election of remedies should not thus be forced upon him. We see no occasion for the application of the doctrine of election of remedies in this case. That doctrine proceeds on the theory that the claimant, having two inconsistent remedies and having availed himself of one, is estopped from also pursuing the other. Commercial Centre R. Co. v. Superior Court, 7 Cal.2d 121, 129, 59 P.2d 978, 107 A.L.R. 714. Such is not the case here. Even before the enactment of said section 725a the holder of a trust deed could maintain an action to foreclose the same. Felton v. Le Breton, 92 Cal. 457, 465, 28 P. 490. He could also proceed at the same time to foreclose by trustee's sale. In other words, the pendency of the action in foreclosure was not a bar to the foreclosure of the deed of trust through the form and procedure of a trustee's sale. Mayhall v. Eppinger, 137 Cal. 5, 69 P. 489; McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 237, 286 P. 693. The pending foreclosure action could have gone forward after the trustee's sale for the purpose of obtaining a judgment for the deficiency, if any, especially when no question of the statute of limitations was involved. Commercial Centre R. Co. v. Superior Court, supra. In such a situation the plaintiff had two concurrent remedies, one by action in foreclosure and one by trustee's sale. The fact that he could not enforce his obligation by court action would not prevent him from pursuing the alternative remedy. Whether he could do so after a final judgment against him in the foreclosure action presents a question

which is not before us. But having two remedies available to him at the outset, and having unsuccessfully availed himself of but one, and no question of election of remedies being involved, the plaintiff is in no position to complain that he could not, because of Mack's cross-complaint, dismiss his foreclosure action, since such dismissal was not essential to the pursuit of his right to proceed by trustee's sale.

The judgment is affirmed.

We concur: WASTE, C. J.; HOUSER, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

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11 Cal.2d 122

COPP v. MILLEN et al.

L. A. 15392.

Supreme Court of California.

April 4, 1938.

Rehearing Denied May 2, 1938.

1. Mortgages 🔑455

In action to foreclose mortgage wherein owner under contract of sale from mortgagor filed cross-complaint to quiet title, dismissal of cross-complaint was error, where cross-complaint and answer thereto raised issue of priority as between the mortgage which had been released of record and renewed, and the contract of sale executed between date of original mortgage and date of its release and renewal, since such issues could be raised in connection with action of foreclosure.

2. Limitation of actions 🔑172

The mortgagor could not by renewal, extension, default, or otherwise, waive bar of limitation so as to preclude its invocation by a third person who purchased mortgaged realty under contract of sale executed after date of original mortgage and before date original mortgage was released and renewed. Code Civ.Proc. § 337, as amended by St.1933, p. 2116.

3. Mortgages 🔑181

The granting of equitable relief to a mortgagee who, after the intervention of a subsequent encumbrance, releases original mortgage and secures a renewal mortgage, is not limited to those cases wherein the mortgagee had no notice of the lien of the intervening encumbrancer.

4. Mortgages 🔑181

Wherever it is shown that the discharge or release of a mortgage by mortgagee after intervention of a subsequent encumbrance was intended not as payment but as extension or renewal of or substitution for the original debt and security, relief will be granted to the mortgagee in accordance with the equities in each individual case.

5. Mortgages 🔑181

Where a mortgagee, subsequent to an intervening encumbrance, releases original mortgage and secures a renewal, equity will place the parties in their original position if the intervening lienholder is not prejudiced by the continuance of the priority of the original mortgage and is in no different position than he would have been, had the release not been recorded, even though mortgagee has some knowledge or notice of the intervening encumbrance.

6. Mortgages 🔑181

The fact that a mortgagee had knowledge of existence of an unrecorded junior encumbrance, at time mortgagee released original mortgage and secured a renewal thereof, was not alone sufficient to exclude the mortgagee from relief as against the junior lienholder by way of foreclosure, where evidence did not show that mortgagee knew or should have known that junior encumbrancer's unrecorded contract to purchase the mortgaged realty was not subject to the mortgage.

7. Mortgages 🔑186(4)

In action involving right of priority as between a mortgage which had been released of record and renewed and an unrecorded contract of sale executed by owner to third person between date of execution of original mortgage and date of its release and renewal, evidence offered by mortgagee to show circumstances under which release and renewal were made and evidence on question of whether third party who had contract of sale suffered any prejudice for which mortgagee was responsible was admissible.

8. Appeal and error 🔑1212(2)

Where defendant fails to avail himself of the defense of the statute of limitations, it is discretionary with the trial court whether, after reversal on appeal, he should be allowed to urge the defense on a second trial. Code Civ.Proc. § 337, as amended by St.1933, p. 2116.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Cora Lord Copp against Vellzora Millen and another to foreclose a mortgage, wherein defendant Winfield Russell filed a cross-complaint. From a judgment for defendant, Russell, the plaintiff appeals.

Reversed.

For prior opinion, see 72 P.2d 111.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

John B. Yakey and Walker R. Flint, both of Los Angeles, for respondent.

SHENK, Justice.

This appeal presents a question of priority as between a mortgage, which had been released of record and renewed, and a contract of sale executed by the owner to a third person between the date of the execution of the original mortgage and the date of the release and renewal thereof.

On July 15, 1923, Vellzora Millen executed and delivered to Andrew J. Copp, Jr., a mortgage for $1,250, due in three years, on a parcel of land in the city of Los Angeles. At the same time she also executed a deed of trust to Copp on the same property to secure payment of $885.55. The aggregate of those sums represented the balance due from Vellzora Millen to Copp on the original purchase price of $2,500. Both instruments were duly recorded. Subsequently and on November 1, 1923, Vellzora Millen entered into a contract of purchase and sale of said property with Winfield Russell for the sum of $3,500. No mention was made in the contract of sale of the mortgage and trust deed, and Russell had no actual knowledge of their existence. He went into possession and made monthly payments of principal and interest on the purchase price. The contract was not recorded.

The mortgage and trust deed were assigned by Copp to his wife, Cora Lord Copp, the plaintiff herein. Vellzora Millen defaulted in the payments under the mortgage and trust deed, and on September 10, 1929, when the statute of limitations was about to bar an action in foreclosure, she executed and delivered to Cora Lord Copp a new note and mortgage for $1,458.48, which represented the balance due under the original mortgage and trust deed. At the same time the original mortgage and trust deed were satisfied and discharged of record. The new mortgage was duly recorded.

At the time of the discharge on the record of the original mortgage and trust deed, Russell had paid $2,917.27 to Vellzora Millen on the principal amount called for under his contract of purchase, plus interest thereon, and subsequently he paid the balance due thereon.

On May 25, 1934, Cora Lord Copp brought an action to foreclose the mortgage dated September 10, 1929, naming as defendants Vellzora Millen and Winfield Russell. Vellzora Millen defaulted. Russell answered alleging ownership and possession of the property under the contract of sale and the plaintiff's actual knowledge thereof. He also filed a cross-complaint wherein he sought to quiet his title to the property. The plaintiff filed an answer to the cross-complaint wherein she set up the mortgage and trust deed of July 15, 1923, and denied knowledge of the existence of the contract. She also alleged that the mortgage of September 10, 1929, was a renewal of the mortgage and trust deed of 1923; that such renewal was intended by the parties as a continuance of the obligation; that the satisfaction of record was solely for the purpose of extending the maturity of the principal obligation and continuing the lien upon the real property as security therefor; that the recital on the record of the release and discharge of the mortgage and trust deed was made by mistake of the parties, but that in truth the debt had not been paid and that the release was given merely for the purpose of affording the mortgagor Vellzora Millen more time within which to pay the debt secured by the mortgage and trust deed by permitting her to make a renewal thereof; that the only agreement between the parties in fact was not one of release but was to the effect that the renewal was given and accepted for the purpose of extending the time of payment of the balance due on the original debt. On those allegations the plaintiff sought judgment of foreclosure as prayed in her complaint.

The trial court found that on September 10, 1929, the plaintiff had actual notice and knowledge of the unrecorded contract of sale. On the basis of such knowledge, and its findings of the facts hereinabove noted, the court rendered judgment in the sum of $1,439.95 for the plaintiff and against the defendant Vellzora Millen, but denied the plaintiff any right of foreclosure. It decreed the right of the defendant Russell to the ownership and possession of the property. The plaintiff appealed. She charges error in the conclusion of the court that she is not entitled to foreclosure, and in its rulings excluding certain proffered evidence. She invokes the application of the equitable principles stated in Parker v. Tout, 207 Cal. 590, 279 P. 431; White v. Stevenson, 144 Cal. 104, 77 P. 828; Van Sandt v. Alvis, 109 Cal. 165, 41 P. 1014, 50 Am.St.Rep. 25; Shaffer v. McCloskey, 101 Cal. 576, 36 P. 196; and Tolman v. Smith, 85 Cal. 280, 24 P. 743.

The evidence, including that offered and rejected by the court, is that the parties did not intend the mortgage of September 10, 1929, as payment of the debt, but intended merely to extend the time for payment by executing a renewal mortgage for the balance due, and that the entry on the record of satisfaction and release of the original security was by mistake of the parties thereto. It also appears therefrom that the entry of the release was due to the mistake of the parties acting under the belief that such renewal mortgage would be a first lien on the property, and that this belief was induced by the report of the title company that no intervening liens appeared of record. Where such facts are present and the equities justify it, the courts have decreed a revival of the old mortgage as a continuing lien. The equitable principle has been variously stated, according to the circumstances of each case: "But, as to the debts secured by the original mortgage, * * * we regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative." Van Zandt v. Alvis, supra, 109 Cal. 165, at page 169, 41 P. 1014, 1016, 50 Am.St.Rep. 25, quoting from Swift v. Kraemer, 13 Cal. 526, 530, 73 Am.Dec. 603. Applying that principle it was held that the trial court was justified in concluding that the first mortgage, having been satisfied only for the purpose of giving effect to the second one, would in equity be deemed to be and remain in force until the demand secured thereby was barred, and that a foreclosure could be decreed as to the note which was not barred.

In Tolman v. Smith, supra, it was said (85 Cal. 280, at page 287, 24 P. 743, 745) that the substitution of a new mortgage did not operate to discharge the old ones, but merely suspended the remedy upon them. "It is well settled that, in the absence of an agreement to that effect, the payment of one note by another is only conditional, and not absolute, payment. It extends the time for payment until the maturity of the new note, or, as it is said, 'suspends' the remedy upon the old note, but does not extinguish it." And, 85 Cal. 280, at page 289, 24 P. 743, 746: "And so where, as in the case before us, one mortgage is substituted for another, equity will keep the first alive when the interests of justice require it."

"By a doctrine closely akin to that of equitable subrogation, and it seems to us one founded in equal equity and reason, the old mortgage, though released, must be substituted for the new and treated as a continuing lien securing the continuing debt." American Savings Bank & Trust Co. v. Helgesen, 67 Wash. 572, 122 P. 26, 27, Ann.Cas.1913A, 390.

[1] The defendant Russell contends that the action by the plaintiff must have been one brought to revive and continue the old mortgage in existence, and that the plaintiff is not entitled to the relief sought under the allegations of her complaint. However, the material allegations in that respect appear by the cross-complaint and the answer thereto, which may be deemed appropriately to have raised those issues in connection with the action of foreclosure (White v. Stevenson, supra, 144 Cal. 104, at page 112, 77 P. 828, 830), and for that reason the trial court erred in dismissing the cross-complaint.

[2] Assuming that otherwise the equities are in favor of reviving and continu-

ing the old mortgage and trust deed, it becomes apparent that the same can be revived and continued as against the defendant Russell unless the bar of the statute of limitations intervenes to prevent it. Section 337, Code Civ.Proc., as amended by St.1933, p. 2116; Barber v. Babel, 36 Cal. 11, 23. The defendant Millen could not, by renewal, extension, default, or otherwise, waive the bar of the statute so as to preclude its invocation by the defendant Russell. Flack v. Boland, Cal.Sup., 77 P.2d 1090; Ekmann v. Plumas County Bank, 215 Cal. 671, 673, 12 P.2d 433; 18 Cal.Jur. p. 416 et seq., and cases cited. Inasmuch as the defendant Russell did not plead the bar of the statute, we deem it expedient to examine into the considerations controlling the equities between the parties aside from any question of the statute of limitations.

[3] In White v. Stevenson, supra, it was said: "Mistake is the foundation of one of the chief branches of equity jurisprudence, and the exercise of equity jurisdiction is frequently had where a contract as written does not express the terms of the actual agreement between the parties. This jurisdiction is often invoked to set aside or cancel the release of a mortgage that has been given under a mistake of fact, or contrary to the evident intention of the parties; notably when, upon the execution of a new mortgage in renewal or as a substitute for a prior one, the former mortgage is released in ignorance of the existence of an intervening lien. Equity looks at the intention of the parties, and will control the effect of a release executed under a mistake of fact, or cause it to be canceled, when no intervening rights have accrued by reason of the mistake." And, quoting from Barnes v. Camack, 1 Barb., N.Y., 392: "The principle which runs through all cases of this description * * * is that, when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." The granting of equitable relief is, however, not limited to those cases wherein the mortgagee had no notice of the lien of the intervening encumbrancer. In Iowa County Bank v. Pittz, 192 Wis. 83, 211 N.W. 134, the mortgagee had both constructive and actual knowledge of intervening liens. It was held that the equities of the case required that the original mortgage be maintained as a continued and paramount lien.

In a case in which the intervening lienor held a mortgage which was a matter of record, it was held nevertheless that the equities required the continuance of the old lien as against the intervening lienor. The court said: "The effect of the transaction was merely to continue plaintiff's original mortgage. * * * If it had by mistake released its mortgage without intending to do so, as, for instance, by executing a release, supposing that it had a paper of a different character, or that the release executed was that of a mortgage upon a different piece of property, there can be no doubt that equity, upon the satisfactory proof that it requires in such case, would relieve the plaintiff from the result of such action, and reinstate the mortgage which had been discharged by mistake. Equity always looks to the substance, and not to the form, of the transaction. There being no intention to release the lien of the first mortgage, its actual release for a momentary period should not, in equity, permit a subsequent lienor to intervene and acquire priority." It was concluded that the relief could be granted although the mistake was not unmixed with negligence. "Unless the mistake is rectified, Isacs [the subsequent lienor] will obtain an unconscionable advantage. The correction of the mistake will leave him in his original position and deprive him of no right to which he is justly entitled." Lomas & Nettleton Co. v. Isacs, 101 Conn. 614, 127 A. 6, 8,

In Capital Lumbering Co. v. Ryan, 34 Or. 73, 54 P. 1093, the subsequent encumbrance was a mechanic's lien. The mortgagee was relieved from the mistake in releasing the original mortgage and taking a renewal thereof where at the time the mortgagee knew that a building was in course of construction and uncompleted. In Bormann v. Hatfield, 96 Wash. 270, 164 P. 921, 923, L.R.A.1917E, 1052, the intervening lien was a matter of public record at the time the release and renewal were executed. The representative of the mortgagor that no intervening liens existed was held to excuse the omission to examine the records before executing the renewal mortgage. The court concluded: "Therefore a subsequent mortgagee who becomes such anterior to the discharge of a prior mortgage cannot, with any show of reason or justice, claim to be injured by the setting aside of the subsequent release and restoring the lien of the prior mortgage. He is in no way prejudiced, but is left to enjoy exactly what he expected to get when he accepted the second mortgage. [Citing sases.]" It was pointed out in Holt v. Mitchell, 96 Colo. 412, 43 P.2d 388, 390, 98 A.L.R. 838, referring to McKenzie v. McKenzie, 52 Vt. 271, that they who are not injured should not be permitted to "speculate in another's blunders." See, also, Pacific National Agricultural Credit Corp. v. Wilbur, 2 Cal.2d 576, 42 P.2d 314; and Notes, 33 A.L.R. 149, et seq.; 98 A.L.R. 848, et seq.

[4] As shown by the decisions herein cited, the courts in this state have applied the principle that wherever it is shown that the discharge or release was intended, not as payment, but as an extension or renewal of or substitution for the original debt and security, relief will be granted in accordance with the equities in each individual case. Thus in Shaffer v. McCloskey, supra, the intervening lien was on record at the time the supposed satisfaction was given. The contention was that the plaintiff was bound by the constructive notice. The court affirmed a judgment granting the equitable relief saying: "In our opinion the judgment should be affirmed. It will be noticed that the judgment in this case does not weaken any position which appellants were induced to take by any conduct of the respondent. It does not take away from them any money which they were induced to invest by any act or laches of respondent, nor does it lessen the value of any security which he in any way induced them to take. They did not acquire any lien after the mortgage had been marked 'Satisfied,' and were not led by a clear record to invest money in the land. They took the deed of trust while the mortgage was in full legal existence, recorded and unsatisfied, and with perfect understanding that it was a valid prior lien, and they are merely seeking to take an advantage offered by an inadvertence or mistake of respondent. This is what equity will not allow."

[5] It follows from the foregoing that some knowledge or means of knowledge of the existence of other person's rights in the property does not in every case preclude the court from granting the relief sought. So that if, notwithstanding the mortgagee had some knowledge or notice, the intervening lienholder is not prejudiced by the continuance of the priority of the original mortgage and is in no different position than he would have been had the release not been recorded, equity will place the parties in their original position.

There is evidence in the record to sustain the trial court's finding that the plaintiff had actual knowledge that the property had been sold by Vellzora Millen to Russell and that the latter was in possession. But it does not appear that the plaintiff knew or should have known that Russell's unrecorded contract to purchase was not subject to the plaintiff's mortgage.

[6, 7] The position of Russell has not been materially changed by the release on the record, with the possible exception relating to the amounts thereafter paid by him under his contract. Therefore under the applicable authorities the plaintiff is entitled to relief at least to the extent that Russell suffered no prejudice by said release. The trial court apparently concluded that the plaintiff's knowledge of the existence of Russell's contract was alone sufficient to exclude the plaintiff from any relief by way of foreclosure. The court refused to admit evidence offered by the plaintiff to show the circumstances under which the release and renewal of the mortgage and trust deed were made. In this the court was in error substantially affecting the rights of the plaintiff. Such evidence was admissible, as well as evidence on the question of whether Russell suffered any prejudice for which the plaintiff was responsible.

[8] When a defendant fails to avail himself of the defense of the statute of limitations, it is discretionary with the trial court whether after a reversal on appeal he should be allowed to urge the defense on a second trial. This right was allowed in Trower v. City and County of San Francisco, 157 Cal. 762, 769, 109 P. 617. On the other hand, action of the trial court in refusing to permit the defendant to make a tardy plea of the statute during a first trial has been sustained. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 83, 57 P. 687; Cooke v. Spears, 2 Cal. 409, 56 Am.Dec. 348; Rossi v. Jedlick, 115 Cal.App. 230, 236, 1 P.2d 1065;

Richards v. Silveria, 97 Cal.App. 166, 275 P. 478; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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25 Cal.App.2d 481

In re MOONEY'S ESTATE.

TEMPLETON v. MOONEY.

Civ. 10756.

District Court of Appeal, First District, Division 2, California.

March 25, 1938.

Wills 🔑675

A will providing for gift of all of testator's estate to his son, followed by, "I hereby request, however," that son pay stipulated sum to testator's brother from testator's estate, did not raise a "precatory trust" in favor of brother, but son was entitled to testator's estate absolutely.

[Ed. Note.—For other definitions of "Precatory Trust," see Words & Phrases.]

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Carrie May Mooney, also known as Carrie M. Mooney, deceased, on the petition of Karl Templeton Mooney, as executor, for settlement of his account and distribution of the estate, wherein objections were filed by Walter H. Templeton, and action by Walter H. Templeton against Karl Templeton Mooney, individually and as trustee and as executor, for a declaratory judgment construing decedent's will. From an adverse decree and an adverse judgment, Karl Templeton Mooney appeals.

Reversed, with directions.

Eugene H. O'Donnell, of San Francisco, for appellant.

Zimdars & Warren, of San Francisco, for respondent.

SPENCE, Justice.

Two appeals are involved herein. Appellant, as executor of the last will and testament of the deceased, petitioned the probate court for settlement of his account and for distribution of the estate. Respondent, who had theretofore filed an action for declaratory relief, filed objections to appellant's petition. By stipulation of the parties, the hearing on the petition and the trial of the declaratory relief action were had at the same time. Appellant appeals from the decree of distribution and from the judgment in the declaratory relief action.

Both controversies arise out of the conflicting contentions of the parties regarding the effect of the following paragraph of the will of the deceased:

"I give, devise and bequeath unto my beloved son Karl Templeton Mooney all of my estate whether real, personal or mixed and wheresoever situated. I hereby request, however, that my beloved son, Karl Templeton Mooney, pay to my beloved brother, Walter H. Templeton, the sum of five thousand dollars ($5,000.00) from the property devised and bequeathed unto my beloved son, Karl Templeton Mooney under the terms of this, my last will and testament."

The court below sustained the contentions of respondent and held that the foregoing provision constituted "a mandatory request and direction" and a "valid and binding obligation" upon appellant. The residue of the estate was therefore distributed to appellant "subject, however, to the claim of said Walter H. Templeton for payment to said Walter H. Templeton by said Karl Templeton Mooney" of said sum of $5,000 and declaring the obligation to pay said sum "to be a charge and lien against and upon all of the property of said estate until said sum is so paid." The judgment in the declaratory relief action contained similar declarations.

Appellant contends that the court below erred in denying his petition to distribute the residue to him absolutely and in entering judgment in favor of respondent in the declaratory relief action. In our opinion this contention must be sustained upon the authority of In re Estate of Browne, 175 Cal. 361, 165 P. 960, 961. Respondent concedes that it was proper to distribute the entire estate to appellant but insists that the terms of the will were sufficient to create a so-called precatory trust in favor of respondent.

In Re Estate of Browne, supra, there was a somewhat similar provision as follows: "All the rest and residue of my property of every kind, character and nature whatsoever, whether real or personal, I give and bequeath unto my beloved son, Clarence W. Browne save and except I desire that he pay out of said property to Miss Cora McGarvey, the sum of two hundred dollars ($200.00), and to Miss Edith Johns the sum of two hundred dollars ($200)." The estate was distributed absolutely to Clarence W. Browne. Miss McGarvey and Miss Johns appealed from the decree of distribution upon the theory that the will created a precatory trust in their favor. The decree was affirmed, the court saying, "Clearly the words above quoted are not sufficient to create a precatory trust in favor of the appellants."

There are numerous authorities on the subject of the effect of precatory words and these authorities are not entirely in harmony. Many of them are reviewed in the recent work of Bogert on Trusts & Trustees, vol. 1, § 48, p. 223 et seq.; and at page 231 the author states: "The tide has run so strongly against turning precatory expressions into words of trust that the ordinary words of request, recommendation, wish, and desire are quite generally construed to have no legal effect." While it has been said that "the construction placed upon one instrument, or particular words used in one instrument, is of little value as a precedent for the construction of another" (In re Estate of Hamilton, 181 Cal. 758, 768, 186 P. 587), we believe that the language used in the will in Re Estate of Browne, supra, was fully as strong as the language used in the will before us and that the decision in that case is controlling here.

The decree of distribution and the judgment appealed from are, and each of them is, reversed with directions to the trial court to enter a decree of distribution in accordance with the views herein expressed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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25 Cal.App.2d 534

HENDRICKS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 11638.

District Court of Appeal, Second District, Division 1, California.

March 30, 1938.

Hearing Denied by Supreme Court May 26, 1938.

1. Evidence ⚷14

It is common knowledge, of which court will take judicial notice, that bones of an ordinary man's leg can be fractured by even a very small rotary motion of foot or leg, if such motion is suddenly arrested and the person making such motion is carrying a heavy weight.

2. Evidence ⚷14, 571(1)

It is common knowledge, of which court will take judicial notice notwithstanding contrary expert testimony, that one injury may cause partial fracture or cracking of leg bone, and that subsequent injury may cause the fracture to become complete.

3. Workmen's compensation ⚷1418

Though Industrial Accident Commission can make findings upon hearsay evidence, it cannot deny award on ground of manifestly absurd and inherently improbable expert testimony.

4. Evidence ⚷571(1)

Expert testimony that contradicts the obvious laws of nature is in fact and in law no evidence at all.

5. Workmen's compensation ⚷1418

Inconsistent testimony of doctors employed by compensation insurance carrier, to effect that workman's leg injury was caused by pathological condition, *held* not to authorize denial of award, in view of workman's testimony indicating that injury was caused by fracture suffered when insurance carrier's doctors induced workman to return to work notwithstanding recent partial fracture.

◆

Proceeding under the Workmen's Compensation Act by Clarence E. Hendricks, claimant, opposed by the Cadmium Nickel Plating Company, employer, and the Pacific Employers Insurance Company, insurance carrier. From an award of the Industrial Accident Commission denying the claim, the claimant brings bill of review.

Award annulled, and application remanded for further proceedings.

Lewis D. Collings, of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Commission.

F. Britton McConnell, of Los Angeles, for respondent Insurance Co.

YORK, Presiding Justice.

Petitioner alleges that on or about the 10th day of August, 1936, while employed by the respondent Cadmium Nickel Plating Company as a truck driver, he sustained injuries in the course of his employment when he picked up a box of metal parts weighing over 200 pounds; that as he started to turn to place said box upon his truck his foot came into contact with the wheel of a hand truck, which had been pushed up and stopped adjacent to the place where petitioner was handling said box of metal parts, and suddenly arrested a turning motion that he was then making. Petitioner felt a severe pain in the region of his right hip or lower right back, but after resting a few moments the pain diminished and he was thereafter able to drive his truck to the plant of respondent employer. Later in the day the pain became intense and petitioner was sent by his employer to McGinnis Staff Hospital for examination, where he was told by the examining physician that he had strained his sciatic nerve. He was treated for several days at this institution and was then sent to two doctors furnished by respondent insurance carrier, who treated him until approximately August 25, 1936, before any X-rays of the injured employee were taken. After said X-ray pictures were taken, petitioner was told by the doctor who took them that there was no injury to his hip or lower right back, and on or about September 1, 1936, said doctor instructed petitioner to return to his work in spite of the fact that petitioner at that time stated he had pain in his right hip and could not use or step on his right leg without pain. Relying upon said instructions of insurance carrier's doctor, petitioner returned to his work on the 2d day of September, 1936, and was given light work sitting at a bench which he was able to perform; on the following day petitioner was asked by another employee to help carry or move a heavy box of parts from a truck. Petitioner felt a severe pain in the region of his right hip or lower right back when he took his first step carrying the box, and on the second or third attempted step thereafter, his right leg collapsed under him and he fell to the floor. Petitioner was again examined by insurance carrier's doctors and was told that he was suffering from sciatic rheumatism, and was later told by another of insurance carrier's doctors that he was not suffering from any sciatic nerve trouble, but that he was suffering from arthritis; that his suffering was not caused by any injury received in the course of his employment; that he could not expect to receive medical attention from insurance carrier, but must obtain his own medical assistance. Thereafter X-rays were again taken and it was found that petitioner had received an impacted fracture of the right femur and that there was a definite shortening of the lower right extremity.

Two hearings were had before referees of the respondent commission, whereupon findings of fact were made denying petitioner any relief.

[1] An examination of the so-called expert testimony upon which the findings of the commission are based discloses that there is a great deal of apparent conflict in the testimony of the doctors for the insurance carrier. Not that the testimony of each doctor conflicts with that of the others, but certain parts of each doctor's testimony conflicts with his own statements. They do not directly state that it would be impossible for a fracture to have occurred exactly as testified to by applicant, although that is the meaning that would be conveyed unless all of their statements were carefully and fully considered. However, it is a matter of common knowledge that bones of the leg of an ordinary man can be fractured by even a very small rotary motion of a foot or leg, if such motion is suddenly arrested, when the person making such motion is carrying a heavy weight. Petitioner suffered a partial fracture in this manner, which is shown by the uncontradicted evidence to have happened at the time the first injury was sustained. When the doctors ordered petitioner to resume work and the second injury (a complete fracture) occurred, petitioner was carrying a heavy weight and was turning, although his foot was not suddenly blocked at the time of the second injury, as it was at the time of the first injury.

[2] The indirect testimony of the doctors was to the effect that when the first examination and the first X-rays were made, the petitioner did not have or had not sustained a fracture (some of them say that no X-rays were take before the second injury); that when they made the second examination the X-ray which was then made showed an old fracture antedating the prior X-rays. A fracture at the place named by petitioner could readily have occurred exactly as petitioner testified, to wit: First, a partial fracture or cracking of the bone, and then when the second injury occurred, it is more than probable, as petitioner testified, the fracture became complete. This is a matter of common knowledge, even if in conflict with the so-called expert witnesses of the insurance carrier.

[3-5] Taken as a whole, the testimony of the experts for the insurance carrier is inherently improbable, if they mean to testify that first a partial fracture and then a second complete fracture could not have occurred as petitioner says it did. In fact, petitioner's testimony is actually corroborated by their last statements. Although we are aware that the commission can make findings upon "secondhand hearsay evidence," we do not think this rule can possibly justify the commission in following such manifestly absurd and inherently improbable testimony, as it must have done here, in order to deny an award in favor of petitioner. Such purported evidence is in fact and in law no evidence at all, for it contradicts and denies the obvious laws of nature. The doctors, who testified that it was a pathological condition which caused the injury, testified that they were not pathologists, and the record does not show that they or any one else discovered any kind of pathological condition that could have caused such a fracture.

The petition for rehearing which was granted by the commission contained many startling statements of fact as to the manner in which the record was made up. However, in the record of the last hearing which resulted in the award which is herein referred to, we note the following:

"Atty. Collings: I know what the issues were, I know what the stipulations were. I know what testimony has been taken on which no opportunity to cross-examine (has been given). When you say there is some special point which has been made by the Commission as to what this Rehearing is to be directed to, that is something I have no knowledge of because I received no notice of it. If something of that character, I would like to see it.

"The Referee: This is a confidential memo that the Commission addressed to the Referee.

"Atty. Collings: Nothing confidential in these hearings."

So far as the record discloses, there was nothing further to show what this confidential memo was which the referee was using as her basis for the rehearing. If we had it, it might account for the nature of the award made. It might explain things which the record does not show, because, as we view the record, there is no actual contradiction of the fact that if proper X-rays were taken at the time of the first injury, undoubtedly the second injury would not have occurred; petitioner's trouble would not have been diagnosed as sciatic rheumatism or as arthritis, which condition the experts, who were employed by the insurance carrier, state was what caused the difficulty with which petitioner was suffering at the time he was examined by them immediately after his first injury. It was at this time that they made an examination of petitioner's back instead of examining his leg where the injury actually occurred. These experts appear to have ignored the uncontradicted evidence that the turning motion, which was imparted to the leg of petitioner at the time of the first injury when he was carrying a 200-pound weight, was suddenly arrested by the interposition of the wheel of the truck against petitioner's foot. It certainly does not take an expert to know that such an injury could occur exactly as related by petitioner, and as it is a matter of common knowledge, the court will take judicial cognizance of such fact.

It follows from the foregoing that the conclusion and award of the commission "that applicant take nothing from defendants herein, and that the defendants be and they are hereby relieved of all liability by reason of the claim asserted in this proceeding and dismissed herefrom" was erroneous, and that its decision to that effect must be and the same is hereby annulled. The application for an award is hereby remanded to the commission for further proceedings in accord with the views expressed in this opinion.

We concur: DORAN, J.; WHITE, J.

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25 Cal.App.2d 539

PEOPLE v. MILLER.

Cr. 432.

District Court of Appeal, Fourth District, California.

March 31, 1938.

1. Assault and battery 🔑92

Evidence that accused drove automobile in which a policeman was assaulted and later covered policeman with a loaded gun sustained conviction of assault with a deadly weapon.

2. Criminal law 🔑814(3)

In prosecution for assaulting a policeman where, at time of committing assault defendant was not resisting an unlawful arrest, evidence did not warrant an instruction that one wrongfully arrested without a warrant could resist and use any and all reasonable means to free himself, based on facts as they reasonably appeared to him.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Juanita Miller was convicted of assault with a deadly weapon, and she appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant, having been convicted of the crime of assault with a deadly weapon, has appealed from the judgment and from an order denying a motion for a new trial.

Briefly stated, the general facts are as follows: On the evening of September 26, 1937, the appellant was riding from San Ysidro to San Diego in an automobile driven by a man named Boyd, whom she claims to have first met on that day. Near the southern edge of San Diego they were stopped by a police officer who had received instructions to pick up this particular car and bring it and the occupants to the San Diego police station. After some conversation the officer got in the rear seat of the automobile and told Boyd to drive to the police station. After they had proceeded a short distance Boyd pointed an automatic over his right shoulder and shot the officer, the bullet going through his elbow. Believing he was going to shoot again, the officer grabbed the gun. In trying to retain possession of the gun Boyd took his hand from the steering wheel and turned around with his knees on the seat, and at the same time the appellant reached over and took the wheel and then slid over and drove the car herself. The officer let go of the gun to reach for his club, and Boyd hit him over the head with the automatic and knocked him unconscious.

When the officer regained consciousness Boyd was in the back seat with the gun poked in the officer's ribs, and the appellant was driving the car. They started for the country going around the business district of San Diego, and several times on the way Boyd told the officer he was going to kill him to prevent his telephoning and setting officers upon the chase. The officer was bleeding badly and suffering considerably. After they had gone a considerable distance the car was stopped. Boyd made the officer get out and get into the front seat and he also got in the front seat and took the wheel. The appellant got in the back seat and Boyd handed her the officer's gun, which he had taken from him and which was fully loaded. The appellant kept this gun pointed at the officer as they proceeded. After driving for some distance in this manner, Boyd drove into an open field and stopped. Just before they stopped Boyd and the appellant were talking about getting rid of the car in which they were riding because it was "hot" and that they would have to hold up someone to get another car. When they stopped, Boyd told the officer to get out and he and the appellant drove away.

[1] It is first contended that the evidence is insufficient to sustain the judgment. It is argued that the shooting of the officer was the independent act of Boyd alone, that the shot was fired so suddenly that neither the officer nor the appellant had an opportunity to prevent it, that the offense was fully consummated before the appellant committed any act which might be said to have had any tendency to aid Boyd and that there is, therefore, no evidence to show that she had any part in committing this offense. Aside from other considerations this argument disregards what occurred after the officer was shot. After this occurred the car was driven in a different direction, the officer was kept covered with the gun and repeated threats to kill him were made. After one of the stops the appellant got into the rear seat of the automobile, pointed the loaded gun at the officer, and kept him covered until he was finally let out of the car. Irrespective of what happened before there can be no question, under this and other evidence which need not be referred to, that the appellant committed the offense with which she was charged and that the evidence is sufficient to sustain the judgment. People v. James, 20 Cal.App.2d 88, 66 P.2d 461; People v. Wells, 145 Cal. 138, 78 P. 470.

[2] It is next urged that the court erred in refusing to give four instructions asked for by the appellant, the effect of which was to tell the jury that one wrongfully arrested without a warrant may resist and use any and all reasonable means to free himself, based upon the facts as they reasonably appear to him. It is argued that the officer was not justified in making this arrest since he had no warrant, since he did not know that a felony had been committed, and since no misdemeanor had been committed in his presence. If it be assumed that an arrest was here made and that this officer was not warranted in making such arrest, the fact remains that neither the appellant nor Boyd resisted the arrest at the time it was made. When he told them to go to the police station they started out in apparent acquiescence. Even on the presumption that some resistance was justified there is no evidence which would justify the shooting of the officer. People v. Giacobbi, 83 Cal. App. 12, 256 P. 299. Up to the time of the shooting there was no reasonable ground for Boyd to believe that the officer intended to do physical injury either to him or to the appellant. After he was shot the officer was knocked unconscious, was disarmed, and was put out of the car. He was then not only in no condition to do them any harm, but was making no attempt to do so. But the appellant and her companion then went further, compelling the officer to accompany them against his will and committing a further assault. When the appellant committed that assault she was not resisting an unlawful arrest and no facts appear in that connection which would justify a jury in finding that she was then properly using this deadly weapon. Under the circumstances shown by the record there was no error in refusing to give these instructions.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

In re BOURN'S ESTATE.

BURGH et al. v. HAYNE.

Civ. 10644.

District Court of Appeal, First District,
Division 1, California.

April 5, 1938.

Rehearing Denied May 5, 1938.

Hearing Denied by Supreme Court
June 2, 1938.

1. Wills 🔑457

Generally, where a will is drawn by a lawyer whose experience and competence is beyond question, the presumption that legal terms embodied in the will are used in their legal sense is all but conclusive. Probate Code, § 106.

2. Wills 🔑619

Where codicil drawn by experienced attorney created annuity for testatrix' husband's sister in amount which would, when added to any "annuity or annuities" otherwise provided for sister, make total annuity of $8,400 a year, proceeds received by sister as her share of income from testatrix' husband's residuary estate under will executed after execution of testatrix' will, which was executed at a time when husband's will as then drawn provided an annuity for his sister, could not be considered in computing amount of annuity bequeathed by testatrix, since words "annuity or annuities" were construable in their technical sense, especially where other provisions of will demonstrated that testatrix used the words advisedly. Probate Code, § 106.

3. Wills 🔑619

Where testatrix executed codicil creating annuity for testatrix' husband's sister in amount which would, when added to any "annuity or annuities" otherwise provided for sister, make total annuity of $8,400 a year, that testatrix did not contemplate that her husband would later change provisions of his will so as to provide for sister with a gift of income instead of an annuity, as was provided in husband's will as drawn at time testatrix executed codicil, would not defeat sister's right to have technical words "annuity or annuities," used in codicil, construed in technical sense. Probate Code, § 106.

4. Wills 🔑486

Conditions or circumstances arising subsequent to the execution of a will and which were probably not foreseen at the time of execution cannot alter construction of language of will.

5. Annuities 🔑1

A gift of an income is not an "annuity."

[Ed. Note.—For other definitions of "Annuity," see Words & Phrases.]

6. Annuities 🔑1

The statute which defines an "annuity" as a bequest does not intend to declare that annuities cannot be granted otherwise than by will. Probate Code, § 161, subd. 3.

7. Annuities 🔑1

Generally, an annuity may be granted by deed as well as by will and may be given by way of marriage settlement or gift, or, like any other chose in action, may be the subject of a contract. Probate Code, § 161, subd. 3.

8. Wills 🔑619

The words "annuity or annuities," used in codicil which provided annuity for testatrix' husband's sister in an amount which would, when added to other annuities provided for the sister by will "or otherwise" or through medium of a family corporation, amount to a specified sum, would not be construed in ordinary nontechnical sense, so that husband's bequest of income to his sister would be considered in computing amount of annuity bequeathed by testatrix, on ground that annuity in its technical sense must be a legacy or bequest, and that reference to annuities created in other ways showed testatrix' intention to use words in general rather than in technical sense, since annuity may be granted by deed as well as by will. Probate Code, § 161, subd. 3.

9. Annuities 🔑1

An annuity may be made payable generally out of any assets of the testator or grantor, or through the medium of trustees, from a trust fund set aside for such purpose.

10. Annuities 🔑5

Where an annuity is payable through medium of trustees from trust fund set aside for such purpose, it is not essential to legal status of annuity that some provision be made to effect that resort may be had to general assets in case trust fund fails in whole or in part, and whether general assets may be resorted to depends entirely upon intention of testator or grantor as expressed by him in the trust instrument. Probate Code, § 163.

11. Wills 🔑729

Where testatrix creates annuity payable from trust fund without making provision that resort may be had to general assets in case trust fund should fail in whole or in part, if trust fund should fail, resort may be had to general assets as in case of a general legacy unless will creating annuity shows intention of testatrix that resort was not to be had to general assets. Probate Code, § 163.

12. Wills ⚿729

The legal character of an annuity created by will is not destroyed if the instrument creating the annuity shows intention of testatrix that resort should not be had to general assets of estate in case trust out of which annuity is payable should fail and annuitant would be entitled to payment of annuity so long as the annuity fund created for such purpose is adequate to that end. Probate Code, § 163.

13. Wills ⚿619

Where testatrix created annuity for her husband's sister and provided that amount of annuity should be such an amount as would be necessary to bring to certain sum the total amount received by the sister from other "annuity or annuities," quoted words were not construable in nontechnical sense so as to include income other than annuity bequeathed by testatrix' husband to his sister, as against contention that the annuity created by testatrix which was payable from a trust fund was not a technical annuity, because there was no provision for resort to general assets upon failure of trust fund, and that such fact indicated intention of testatrix to use words in nontechnical sense, especially in absence of proof that trust fund was likely to fail in whole or in part.

14. Courts ⚿202(5)

Where construction given a will by trial court appears reasonable and consistent with intent of party making it, reviewing court will not substitute another interpretation, even though it seems equally tenable.

15. Wills ⚿104

The maxim, "That is certain which can be made certain," applies in probate proceedings. Civ.Code, § 3538.

16. Wills ⚿619

A bequest which was termed an annuity was a bequest of "certain specified sums," as quoted words are used in Probate Code provision distinguishing an "annuity," from other legacies, even though amount of annuity was ascertainable by process of subtracting from a stated sum amounts of annuities legatee would receive from other sources, since a sum is deemed certain where it can be made so simply by calculation. Probate Code, § 161, subd. 3; Civ.Code, § 3538.

17. Wills ⚿487(1)

In proceeding to construe provision of codicil bequeathing to testatrix' husband's sister annuity in a sum which would, when added to any "annuity or annuities" otherwise provided for the sister, amount to a specified sum, conversation between the testatrix and the attorney who drew the codicil, prior to time codicil was executed to show intention of testatrix was inadmissible, especially where no uncertainty existed, and codicil was construable from its unambiguous provisions. Probate Code, § 105.

18. Wills ⚿440

The intention to be sought in construing a will is not that which existed in the mind of testatrix, but that which is expressed in language of the will; the issue being not what the testatrix meant to do or what she intended to declare in her will or what words she meant to use, but what she meant by what she did declare in the will and by the words she actually used therein.

19. Wills ⚿440

Where language of will is clear, courts have no power to speculate as to the testatrix' intention.

20. Courts ⚿202(5)

In proceeding to construe provision of codicil bequeathing to testatrix' husband's sister annuity in a sum which would, when added to any "annuity or annuities" otherwise provided for the sister, amount to a specified sum, exclusion of testimony as to conversation prior to execution of codicil between testatrix and attorney who drew the codicil, even if erroneous, was not prejudicial, since statements so made by testatrix to the attorney could not alter unambiguous terms of the codicil. Probate Code, § 105.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding in the matter of the estate of Agnes M. Bourn, deceased, wherein the probate court was called upon to construe one of the provisions of a codicil to the decedent's will creating an annuity in favor of

Mrs. Maud Bourn Hayne. From that portion of the decree of final distribution determining the issue in favor of Mrs. Maud Bourn Hayne, Elizabeth Vincent Burgh and others appeal.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Sloss, Turner & Finney, of San Francisco, for appellants Elizabeth Rose Vincent Burgh and Arthur William Bourn Vincent, a minor, by American Trust Co., as guardian.

Warren Olney, Jr., John W. Parker, Robert L. Lipman, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for appellants the Bank of California, National Association, Wells Fargo Bank & Union Trust Co., Agnes Lancaster, Helen Doran, Julia Lancaster Blood, William Blood, Virginia L. Blood, Helen Inches McLeish, and Kate Marshall.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

KNIGHT, Justice.

At the time of the final settlement of the estate of Agnes M. Bourn, deceased, the probate court was called upon to construe one of the provisions of a codicil to the decedent's will creating an annuity in favor of the respondent, Mrs. Maud Bourn Hayne, the point at issue being as to the amount of annual payment that should be made thereunder; and from that portion of the decree of final distribution determining said issue the executors and several beneficiaries have appealed, contending as main ground for reversal that the court erred in construing in their technical sense certain technical words used in the provision creating said annuity.

The pertinent facts are these: The decedent was the wife of William B. Bourn. She died January 3, 1936, and her husband's death occurred six months later. By the provisions of article IV of her will, Mrs. Bourn set aside a trust fund of $550,000, and directed payment therefrom of nine annuities. On the same day, September 17, 1929, she executed a codicil increasing the corpus of the trust to $600,000, and creating three additional annuities. The annuitants named were Mr. Bourn's three sisters, one of whom was Mrs. Hayne; and the separate provisions of the codicil creating said three annuities were identical in form. The will and the codicil were drawn by an attorney; and the following is the provision of the codicil creating the annuity in favor of Mrs. Hayne: "I * * * add to the annuities provided for in said article (IV) the following: An annuity to Maud Bourn Hayne, the sister of my husband, during her life, in such amount as will, when added to any *annuity or annuities* otherwise provided for her by my husband by will or otherwise, or by my husband and myself, directly or through the medium of Filoli Estate, or otherwise, make a total annuity of eighty-four hundred (8400) dollars a year." (Italics ours.) At the time the codicil was executed Mr. Bourn had already made his will, and Mrs. Bourn knew of its contents. In that will he had provided Mrs. Hayne with an annual annuity of $3,600; and through the medium of Filoli estate (a family corporation) she had been provided with and was then receiving an annual annuity of $2,400, of which Mrs. Bourn was also aware; so that if those conditions had remained unchanged the amount of annuity Mrs. Hayne would have been entitled to receive from Mrs. Bourn's estate would have been $2,400 a year. However, on October 3, 1934, fifteen months before Mrs. Bourn died and approximately twenty-one months prior to the death of Mr. Bourn, he made a new will. It was drawn by the same attorney who drew Mrs. Bourn's will and codicil, and in his later will Mr. Bourn made no provision for an annuity for Mrs. Hayne, as he had in his earlier will, but in lieu thereof he bequeathed to her during her life one-third of the net income of his residual estate. Appellants claimed, however, on proceedings for final distribution, that whatever she received under Mr. Bourn's will as such gift of income, although admittedly not constituting an annuity, must nevertheless be taken into account in reducing the amount of annuity she was entitled to receive under the codicil to Mrs. Bourn's will; that accordingly if her share of said income in any one year when added to the Filoli estate annuity equalled $8,400, she would be entitled to nothing from Mrs. Bourn's estate; or if when added to the Filoli estate annuity it did not equal $8,400 she would be entitled only to the difference. After hearing the evidence, however, the probate court held in effect that there was no ambiguity or uncertainty in the language used in the codicil to Mrs. Bourn's will creating said annuity in favor of Mrs. Hayne, and that the codicil and the will had been drawn by a lawyer of profound legal learning and many years' experience; that therefore, under the provisions of section 106 of the Probate Code, the technical words "annuity or annuities," over which the controversy arose, must be taken in their technical sense. The court then went on to hold in conformity with the established law upon the subject that a gift of income is not an annuity; that such being the case, the proceeds received by Mrs. Hayne as her share of the income from Mr. Bourn's estate could not be taken into consideration in computing the amount of the annuity bequeathed to her by Mrs. Bourn; that consequently she was entitled to an annual annuity from Mrs. Bourn's estate in the sum of $6,000; and an adjudication to that effect was embodied in its decree.

[1, 2] We are of the opinion that the probate court's decision is fully supported. As declared by said section 106, "technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense"; and it is held generally that where the will is drawn by a lawyer whose experience and competence is beyond question, the presumption that legal terms embodied in the will are used in their legal sense is all but conclusive. See Hay v. Dole, 119 Me. 421, 111 A. 713; In re Leonard's Estate, 143 Misc. 172, 256 N.Y.S. 355, citing numerous authorities. Here, as pointed out by the probate court, the will and the codicils thereto (there were four of them) were drafted by a lawyer of competence and experience; and admittedly there is a broad, well-recognized legal distinction between an annuity and a gift of income; furthermore, the estate which was to be disposed of by said testamentary documents was known to be very large, the same having been later appraised at more than $3,000,000. It is certain, therefore, that in order to express accurately the true intent and wishes of the testatrix, and to avoid ambiguity and hence future dispute, all of said documents were prepared with deliberation, and all legal terms employed in drafting the same selected with studied care.

Moreover, the numerous provisions of said testamentary documents themselves demonstrate beyond question that at the time Mrs. Bourn executed the same she had definitely in mind the difference between an annuity and a mere gift of income, and that in disposing of her vast estate she used each of those terms advisedly and with discrimination. In this respect it appears that by said testamentary documents she created seventeen or more cash legacies and directed that the amounts of several of them be computed in a manner prescribed therein by her; that in addition thereto she created, but in very different and appropriate language, some thirteen annuities, and directed also that the amounts of the three created by the first codicil be computed in a manner therein prescribed by her, but which was widely different from the one prescribed for the computing of the amounts of said legacies. Thus with respect to the legacies she directed that the gift to Mills Memorial Hospital be reduced by *"amounts* given it by my husband either by will or otherwise"; that the gift to St. Luke's Hospital be reduced by any *"gift or gifts* to said hospital" received by it from "my husband by will or otherwise"; that the gift to Episcopal Cathedral of San Francisco be reduced by *"any gifts* by my husband for the same purpose." Furthermore, by her will she bequeathed to her son-in-law, Arthur Rose Vincent, annually during his life, 20 per cent. of the income of her residual estate; but by the third codicil to her will she limited the total amount he should receive by directing that he be paid annually during life from said income "such sum as may be required to make the total aggregate *amount* which he receives under my will, *under the will of my husband, and under or by virtue of any trusts which my husband or myself may have established in our lifetimes* * * * equal to the sum of Seventy Thousand (70,000) Dollars per annum." (All italics ours.) It is plain to be seen, therefore, that when she intended that the amount of a bequest should be reduced not only by annuities created by her husband, but also by any other character of gifts provided by him, she so declared, and made her intention abundantly clear.

But, as stated, in sharp contrast therewith was the method prescribed for computing the amounts of said three annuities. As to each of them she restricted the deductions to *"any annuity or annuities"* provided by her husband or through the medium of Filoli estate. From the foregoing it is quite obvious that if she had intended, as in the case of said legacies, that the amounts of said annuities be fixed by deducting from said stated sum not only the amounts of any "annuity or annuities" provided by her husband, but also the amounts of any gift or gifts provided by him, including a gift of income, she would have used language similar to that used in reducing the amounts of the legacies. In re Gurnee, 84 Misc. 324, 147 N.Y.S. 396; Id., 214 N.Y. 660, 108 N.E. 1095. But she did not do so. On the contrary, as shown, she limited such reduction to "any annuity or annuities" provided by him.

[3, 4] We have, then, a will which with clearness and precision distinguishes annuities from other kinds of gifts, including gifts of income, and besides uses those different terms in their proper legal sense; and manifestly, in that situation, to hold as appellants contend should be held, that the term "any annuity or annuities" shall be construed to include the gift of income bequeathed by Mr. Bourn to Mrs. Hayne would not only be doing violence to the legal meaning of the term "annuity", but in effect would be rewriting the provisions of Mrs. Bourn's will. Nor would it make the slightest difference that when Mrs. Bourn made her codicil she did not contemplate that her husband would later change the provisions of his will so as to provide Mrs. Hayne with a gift of income instead of an annuity, for it is well settled that conditions or circumstances arising subsequent to the execution of a will and which were probably not foreseen or anticipated at the time cannot alter the construction of the language of the will, any more than can changed circumstances of a beneficiary justify a court in modifying testamentary provisions to meet such changed circumstances. 69 Cor.Jur., p. 130.

[5-8] Appellants agree that said words "annuity or annuities" have a well-defined legal meaning; also, that it is settled law that a gift of income is not an annuity, and that therefore, if said words are to be taken in their technical sense, the decision of the probate court is sound. But they contend that the context of said codicil clearly indicates an intention to employ said words not in a technical sense, but in their ordinary, grammatical meaning; and in this behalf they make two principal points, both of which are based on the provisions of subdivision 3 of section 161 of the Probate Code, formerly section 1357 of the Civil Code. Their first point is that as defined by said Code section an annuity in its technical sense must be a legacy or bequest; that therefore, when Mrs. Bourn spoke in her codicil of any annuity or annuities provided by her husband by will "or otherwise", or "through the medium of Filoli Estate or otherwise," she was evidently using said words annuity or annuities in a general rather than a technical sense, because, so they assert, any annuity provided by Mr. Bourn "otherwise" than by will, or "through the medium of Filoli Estate," would not be a legacy or a bequest, and hence not an annuity. There is no merit in the point. As stated in California Jurisprudence, "* * * the code, in defining an annuity as a bequest, has not intended to declare that annuities cannot be granted otherwise than by will. The general rule is that an annuity may be granted by deed as well as by will, may be given by way of marriage settlement or gift, or like any other chose in action may be the subject of a contract." 2 Cal.Jur. § 1, p. 77; see, also, cases cited in commissioner's note, Civ.Code, § 1357, and 2 Ruling Case Law, p. 2.

Secondly, they contend that despite the fact that in drawing said codicil the term "annuity" was selected as the proper legal appellation to describe the bequests Mrs. Bourn was therein making in favor of Mr. Bourn's three sisters, and also the periodic payments they were then receiving through the medium of Filoli estate, said term was used nevertheless in each instance in a nontechnical sense for the reason, so appellants claim, that neither of said bequests nor said payments constituted a true annuity within the meaning of said subdivision 3 of section 161 of the Probate Code. The principal ground of attack thus made against the legal status of said annuities is that they are payable from trust funds with no provision being made that resort may be had to the general assets in case the trust fund fails in whole or in part; that therefore said annuities do not provide for the payment of "certain specified sums," subdivision 3, § 161, Probate Code, because, so appellants claim, the amounts to be paid may fluctuate according to the sufficiency of the trust fund. Appellants argue, therefore, that if in those instances the term "annuity" was used in a nontechnical sense, it follows necessarily that it was used likewise in a nontechnical sense in referring to "any annuity or annuities" provided by Mr. Bourn.

[9-13] It is doubtless the law, however, as shown by the authorities cited in respondent's brief, that an annuity may be made payable generally out of any assets of the testator or grantor, or through the medium of trustees, from a trust fund set aside for such purpose. In re Johnson's Estate, 144 Misc. 60, 258 N.Y.S. 850, and that in the latter case it is not essential to the legal

status of the annuity that some provision be made to the effect that resort may be had to the general assets in case the trust fund fails in whole or in part; that whether or not in any given case the general assets may be resorted to depends entirely upon the intention of the testator or grantor, as expressed by him in the trust instrument. In other words, as declared by section 163 of the Probate Code, formerly section 1370 of the Civil Code, "The provisions of this chapter [of which section 161 defining an annuity is a part] are in all cases to be controlled by a testator's express intention"; and it follows, therefore, as provided in subdivision 3 of said section 161, that if the fund or property out of which the annuity is payable fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy. Matter of Kohler, 96 Misc. 433, 160 N.Y.S. 669, cited approvingly in In re Johnson's Estate, supra. On the other hand, if it appears from the document creating the annuity that it was the intention of the testator or grantor that resort was not to be had to the general assets, such intention must prevail, Estate of Phelps, 179 Cal. 703, 178 P. 846; but even in such case the legal character of the annuity is not destroyed, and the annuitant is entitled to the payment of the annuity so long as the annuity fund created for such purpose is adequate to that end. The following are among the other authorities cited by respondent from which the foregoing doctrine is deducible: Crew v. Pratt, 119 Cal. 131, 51 P. 44; Pomeroy on Equity Jurisprudence, § 1134; Lumley on Annuities, p. 294; Creed v. Creed, 1844, 11 Cl. & Finn. 491, 8 Eng.Rep. 1187; Mann v. Copeland, 1817, 2 Madd.V.C. 223, 56 Eng. Rep. 317; Lomax v. Lomax, 1849, 12 Beav. 281, 285, 50 Eng.Rep. 1070; Ion v. Ashton, 1860, 28 Beav. 379, 54 Eng.Rep. 411; Hawkins on Wills, p. 290.

Furthermore, it may be stated in answer to the above contention that appellants fail to point to anything in the context of any of the testamentary documents executed by Mrs. Bourn or elsewhere in the record to justify the inference that the trust funds out of which said two annuities are payable are likely to fail in whole or in part. Quite to the contrary, it appears that Mr. Bourn made ample provision in his will to guarantee the full payment of the numerous Filoli estate annuities out of the residue of his estate in case the Filoli estate fund created for such purpose proved insufficient; and Mrs. Bourn provided in her will that resort may be had to the corpus of the $600,000 trust set aside by her for the payment of the annuities she had therein provided, if the income from said fund became inadequate. It would seem, therefore, in view of the foregoing factual situation, that appellants' contention is fundamentally unsupported.

[14] In any event, the provisions of the Probate Code declare that a clear and distinct bequest cannot be affected by other words not equally clear and distinct or "by inference or argument from other parts of the will," section 104, Probate Code; and it is a well-established principle of law that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Estate of Boyd, Cal.App., 74 P.2d 1049. Here the probate court held in effect that Mrs. Bourn's bequest to Mrs. Hayne was clear and distinct, and that therefore the legal meaning of the words "annuity or annuities" as used in said codicil in connection with Mr. Bourn's will could not be altered, broadened, or destroyed by inferences or arguments founded on words taken from other parts of the will (Estate of Oliver, 10 Cal.App. 2d 336, 51 P.2d 1118; Estate of Oliver, Cal.App., 68 P.2d 735); and we are convinced that for the reasons already stated such construction appears both reasonable and consistent with the intent of the testatrix.

[15, 16] Nor can it be held, as appellants further contend, that the annuity provided by Mrs. Bourn for Mrs. Hayne is not a bequest of "certain specified sums" merely because the amount of said annuity is to be ascertained by the process of subtracting from the stated sum of $8,400 the amounts of the annuities she received from other sources. "That is certain which can be made certain," Civ. Code, § 3538, is a maxim which applies in probate proceedings, Estate of Clarke, 103 Cal.App. 243, 284 P. 231, as well as in civil cases, H. & W. Pierce, Inc. v. Santa Barbara County, 40 Cal.App. 302, 180 P. 641; and as held in the latter case a sum is deemed certain where as here it can be made so simply by calculation. We find nothing in the cases cited by appel-

lants including the Estate of Brown, 143 Cal. 450, 77 P. 160, which conflicts with the views hereinabove expressed. They were cases wherein the wills disclosed no intention whatever to create annuities. Pure gifts of income were there bequeathed, payable exclusively out of income or net profits. It was held, therefore, in accordance with the settled law upon the subject, and contrary to the contentions therein made by the beneficiaries, that said gifts of income were not annuities, and consequently were not payable out of the general assets or from the date of the testator's death.

The remaining point presented by the appeal relates to the competency of certain testimony given at the trial by the attorney who drew said testamentary documents, as to conversations had with Mrs. Bourn just prior to the time said codicil was drawn and executed. The substance of such testimony was that during said conversations Mrs. Bourn expressed herself as much perturbed at the provisions made by her husband in his will for his three sisters; that she considered the same inadequate, and unworthy of a man of his financial means and position; and that from time to time she had remonstrated with him about the matter, but had been unable to persuade him to make any change; that finally, during said conversations and in reponse to an inquiry made by Mrs. Bourn as to whether she could make suitable testamentary provision for them herself, said attorney suggested that by her will she could provide that they should receive an annuity in addition to whatever Mr. Bourn might give them, or that she might by will give them an amount sufficient to make up whatever she thought would be suitable; that thereupon he drafted the codicil accordingly and mailed it to her with a letter explaining its purpose and effect. Said oral testimony was admitted over respondent's objection and subject to a motion to strike; and before the cause was submitted for decision the probate court granted respondent's motion in part, by striking out the testimony as to the substance of said oral conversations and permitting the letter to remain as part of the evidence in the case.

[17-20] We find no error in the trial court's ruling. The last clause of section 105 of the Probate Code, which is a reenactment of section 1318 of the Civil Code, provides that when an uncertainty arises on the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, but excluding the oral declarations of the testator as to his intention; and the testimony in question was introduced by appellants in furtherance of their theory that an uncertainty had arisen upon the face of the will by reason of the use of the technical term "any annuity or annuities." But as held by the probate court, and properly so in our opinion, no such uncertainty existed. Moreover, the testimony was doubtless incompetent for the reason that said conversations necessarily involved the declarations of the testatrix as to her intentions. And in any event, the law is well established that, in construing a will, the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will, the issue before the court being, always, not what the testator meant to do or what he intended to declare in his will or what words he meant to use therein, but what he meant by what he did declare therein and by the words he actually used in his will (Estate of Major, 89 Cal.App. 238, 264 P. 542; Estate of Ogden, 78 Cal.App. 412, 248 P. 680); and where, as here, the language of the will is clear and unambiguous, courts have no power to speculate as to the testator's intention. Estate of Hartman, Cal.App., 68 P.2d 744. It follows, therefore, that even though the testimony as to said conversation be deemed competent, its exclusion was not prejudicial because the statements so made by the testatrix to said attorney, whatever they may have been, cannot be allowed to alter the unambiguous terms of the will.

The decree is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

25 Cal.App.2d 579

NEVADA COUNTY LUMBER CO. v. JANISS et al.

Civ. 5902.

District Court of Appeal, Third District, California.

April 1, 1938.

Hearing Denied by Supreme Court May 26, 1938.

1. Appeal and error ⇨1010(1)
Mechanics' liens ⇨288(3)

Under statute providing that occupation or use of a building by owner or his representative, accompanied by cessation from labor thereon, is a completion of the job for purpose of determining limitation of time within which a notice of claim of lien may be filed, time of completion is a fact question, and the reviewing court may not interfere with a determination on the question where there is substantial evidence to support it. Code Civ.Proc. § 1187.

2. Mechanics' liens ⇨132(7)

Where construction contract required construction of suitable sewer system to connect a building with a septic tank, building was occupied by a tenant on December 2, 1935, and notice of claim of lien was filed on March 16, 1936, evidence that sewer system failed to operate and that contractor procured necessary materials and removed and replaced drain pipes from December 16 to 20, 1935, showed that building was not "completed" until December 20, 1935, and hence notice of claim of lien was filed within 90-day period of time allowed by statute. Code Civ.Proc. § 1187.

[Ed. Note.—For other definitions of "Complete; Completion," see Words & Phrases.]

3. Mechanics' liens ⇨48

A mechanic's lien will vest only to secure payment for materials actually used in the particular building against which the lien is sought to be enforced. Code Civ. Proc. § 1183.

4. Mechanics' liens ⇨184

Where materials for two identical buildings to be constructed on adjoining tracts under separate contracts were ordered and delivered together and used on both buildings at the same time in equal proportions, trial court erroneously vested mechanic's lien against one tract to secure entire unpaid balance of bill for materials, since lien against that tract should have been limited to half of unpaid balance. Code Civ.Proc. § 1183.

5. Mechanics' liens ⇨239

On question whether mechanic's lien for materials used in constructing two identical buildings on adjoining tracts under separate contracts should vest against one tract to secure entire unpaid balance due, statute providing for crediting of payments to obligations in order of priority of maturity did not apply where materialman kept only one account against contractor, both buildings were constructed and completed at the same time, and materials were ordered and delivered together. Code Civ.Proc. § 1183; Civ. Code, § 1479, par. 3, subds. 1–3.

6. Mechanics' liens ⇨157(7)

The trial court erroneously vested a lien against one tract to secure entire unpaid balance of bill for materials used in constructing identical buildings on adjoining tracts on theory that landowner's counsel waived invalidity of lien for more than half of unpaid portion of balance, where counsel required materialman to prove that materials represented by unpaid balance were actually used in building on tract sought to be charged and did not concede that lien could vest against that tract for full amount allegedly due.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Suit by the Nevada County Lumber Company against Lorraine Janiss and another to foreclose a mechanic's lien. From a judgment for plaintiff, the named defendant appeals.

Judgment modified and, as modified, affirmed.

W. E. Wright, of Nevada City, for appellant.

Vernon Stoll, of Grass Valley, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

In a suit to foreclose a mechanic's lien, judgment was rendered against George M. Bobst, the contractor, for $799.07, the unpaid balance due plaintiff for materials furnished and used to construct two duplex cabins for Lorraine Janiss upon adjacent parcels of land in Nevada county. The two similar duplex cabins were constructed at the same time by the same contractor under separate agreements. The orders for materials for the two buildings were not segregated. The materials were hauled to the premises and divided equally between the two structures as the work progressed. The plaintiff kept but one account against the contractor for materials sold for both buildings. Payments were credited to that account without regard to the separate buildings which were being constructed. After the work was completed a balance of $799.07 for materials purchased remained unpaid. A notice of claim of lien was filed by the plaintiff as provided by section 1187 of the Code of Civil Procedure, March 16, 1936. The adjoining tracts upon which the two duplex cabins were built are designated as parcels "A" and "B." The court rendered a decree vesting a mechanic's lien for the full amount of the unpaid balance against parcel "B," belonging to the defendant Lorraine Janiss, and directed the sale of that property to satisfy the judgment. From that judgment the defendant Janiss, only, has appealed.

The appellant contends that two findings which were adopted by the court are not supported by the evidence. The challenged findings are to the effect that the notice of claim of lien was filed December 20, 1935, within the 90 days' limitation prescribed by section 1187 of the Code of Civil Procedure, and that all materials, represented by the unpaid balance of $799.07, were used in the building constructed on parcel "B" of the land involved in this suit.

It is conceded the two buildings were exactly alike in plans, specifications, and cost thereof. The contract for the one to be built on parcel "A" was executed September 23, 1935. The one to be constructed on parcel "B" was made October 8, 1935. The defendant Janiss owns both pieces of property. Both buildings were, however, constructed by the same contractor at the same time. The contracts were not recorded, nor was the notice of completion of the buildings filed by the owner in the office of the county recorder.

We are of the opinion the court's findings that the building on parcel "B" was not completed until December 20, 1935, and that the notice of claim of lien which was filed March 16, 1936, was therefore within the authorized statutory time, are supported by the evidence. It is true that one part of the duplex cabin on parcel "B" was occupied by a tenant of the defendant Janiss on December 2, 1935, but substantial work necessary to the completion of the contract was performed as late as December 20, 1935. The appellant contends that the occupancy of the premises by a tenant on December 2d constituted acceptance of the premises and acknowledgment of completion of the job, and that the services which were later performed were unsubstantial and did not extend the time when the job is deemed to have been completed.

[1] Section 1187 of the Code of Civil Procedure specifies certain circumstances which "shall be deemed equivalent to a completion" of a contract for the purposes of that chapter of the Code. The provision relied on by the appellant declares that "the occupation or use of a building * * * by the owner, or his representative, accompanied by cessation from labor thereon" will be deemed to constitute a completion of the job, for the purpose of determining the limitation of time within which a notice of claim of lien may be filed. It will be observed the statute does not declare that mere occupation of the building is sufficient to set the statute of limitations running. That occupation must be accompanied by cessation from labor thereon. The question of the completion of a building is one of fact, with the determination of which we may not interfere where there is substantial evidence to support the finding in that regard.

[2] The fulfillment of the contract in question required the construction of a suitable sewer system to connect the building with a septic tank. The sections of this sewer pipe line had been so joined that the cement which was used for that purpose filled the pipes and obstructed the drainage. The system failed to operate. Within the time allowed for filing the notice of claim of lien, the attention of the contractor was called to that defect, and on the 16th, 17th, and 20th of December, he, in company with other workmen, procured the necessary materials and removed the drainpipes, replacing them with other sections to complete his contract. Eleven hours of work and three men were employed in completing the job. Mr. D. T. Smith, the plumber who, in company with the contractor, worked on the project, testified in that regard:

"I cleared a sewer line, so the water would travel from the house to the septic tank instead of backing up in the line and flooding the floors in the house. * * *

I put on sewer cocks or water faucets on the side of the house. * * * Instead of putting it together in the way it should have been done they had forced all the cement in the joint and the water wouldn't go through. * * *

"Q. Were there fourteen pieces of four inch, two foot, vitrified sewer pipe [used on that job]? * * * A. Yes, but to pick up both houses.

"The Court: Did they each have a separate tank? A. No. * * * It had to be fixed before it would operate. * * *

"Q. How much time did you put in in putting those on or installing those items? A. Eleven or twelve hours. * * * The date on the first tag 8892 [when the work was performed] is December 16th, the date on the next tag is December 17th, the 9902 tag. The last tag number 9039, was December 20th [when the work was completed]. * * *

"Q. This work consisted of repairing a line to the septic tank? A. No, I put in a whole new line. * * * The line never functioned because the water would never go through it. * * *

"Q. You removed the pipe line that was put in originally and put in a new one? A. Yes sir."

This furnishes evidence that the building with its necessary sewer system was not completed until December 20, 1935. The notice of claim of lien was filed March 16, 1936, which was within the 90-day period of time allowed by the statute.

[3] The appellant contends that since a mechanic's lien may be established for the value of materials, only, which have actually been used in the construction of the particular building sought to be charged, the lien in this case should have been limited to one-half of the amount of the unpaid balance, for the reason that all materials were equally divided between the two structures. The rule is well established that a mechanic's lien will vest only to secure payment for materials which are actually used in a particular building. It is said in Stimson Mill Company v. Los Angeles Traction Company, 141 Cal. 30, 74 P. 357: "It is settled by many decisions in this state that, to entitle a materialman to a lien under section 1183, Code Civ.Proc., the materials must be furnished to be used, and must actually be used, in the construction of the building or other structure against which the lien is sought to be enforced."

[4, 5] In the present case the evidence is undisputed that the materials for the two buildings under separate contracts were ordered and delivered together on the premises, and that they were used upon both buildings at the same time in equal proportions. It follows that only one-half of the materials which were charged in one account against the contractor were actually used in the building constructed on tract "B," and the lien upon that building should therefore be limited to one-half of the unpaid balance of that account. The finding of the court in that regard is therefore not supported by the evidence.

In answer to the foregoing conclusion, the respondent asserts that the rule regarding the crediting of payments to obligations in the order of their priority of maturity is controlling in this case. Section 1479, paragraph, 3, subdivisions 1–3, Civ.Code. That section provides that, when a debtor makes a payment upon several obligations due to another person without designating the debt to which it shall be applied, and the creditor also fails to elect to apply it to a particular obligation, then it must be credited in the following order: (1) To interest due at the time of performance; (2) to principal due at that time; (3) to the obligation earliest in date of maturity.

We are of the opinion section 1479 of the Civil Code has no application to the facts of this case. It is true that the contract to construct the building on tract "A" was made September 23, 1935, and the contract for a similar building on tract "B" was made October 8, 1935; that both buildings were constructed and completed at the same time; and that the lumber and materials for these two buildings were ordered together. We must assume the obligations to pay for each combined order for materials for both buildings matured at the same time when the several orders were delivered. In other words, under the evidence of this case, the obligation to pay for materials for one of those buildings did not mature "at an earlier date" than the implied promise to pay for the materials furnished for the other building. The cited section therefore furnishes no rule which applies to the facts in this case. There is no evidence that the plaintiff first applied the payments which were made to extinguish the indebtedness against tract "A." In fact the evidence appears to be just the contrary. One account only was kept by plaintiff against the contractor for materials used in constructing both buildings. It merely appears that, when payments were made, they were credited to this one account, and that a balance on both contracts of $799.07 remained unpaid.

[6] The court vested the lien against tract "B" to secure the entire unpaid balance of the bill for materials on the theory that counsel for the appellant at the trial waived all other objections to the rendering of a judgment, except the one regarding the time when the building is deemed to have been completed.

Regarding the subject affecting the appellant's assumed waiver of the invalidity of the lien for more than one-half of the unpaid portion of the indebtedness for materials, a colloquy occurred between the court and counsel after the evidence was closed. The court said: "The whole case comes down to just a question of law as to whether or not the testimony of this plumber would constitute a completion at that time."

To this statement Mr. Wright, attorney for the appellant, replied: "That is the only question that is involved. That is the position we take, that the building was completed not later than December 1st."

After stating that the only question to be determined was one of fact as to whether the building was completed prior to the time when the work on the sewer pipes was performed, the court added: "That is about all there is to the case," to which Mr. Wright replied: "That is all there is."

In reading the entire record, however, it appears that counsel for the appellant was careful not to waive the necessity of requiring plaintiff to prove that the materials represented by the unpaid balance of the bill were actually used in the building on parcel "B" sought to be charged with the lien. The plaintiff attempted to prove by Mr. Brittan, the carpenter who worked on that building for the contractor, Bobst, what particular lumber and materials were actually used in constructing the building on that tract. He said that all materials were equally divided between the two buildings and he was unable to say just what particular materials were used in either structure. The court then said: "It doesn't make much difference which one it went into; you can divide it by two. It would give you what went into each."

The attorney for appellant then replied: "To hasten this matter, I have no objection to admitting that fifty per cent of these labor charges and supplies and materials went into each building. * * * I see that this witness couldn't definitely state so we will admit that."

Mr. Wright also stipulated that the amount or balance "owed by Mr. Bobst to the Nevada County Lumber Company was seven hundred ninety-nine dollars and seven cents, less sixteen dollars and forty-four cents." He did not concede that the lien under any circumstances could vest against parcel "B" for that full amount. The clear inference seems to be that he contended just the opposite. We are of the opinion the record does not justify us in assuming the appellant waived her right to object to the lien on parcel "B" for the full amount of the indebtedness. The judgment vested a lien on tract "B" to secure the payment of $799.07 and interest to the date thereof, aggregating the sum of $847.48. The judgment vesting the lien should therefore be reduced to the sum of $423.74, with interest at the rate of 7 per cent. per annum from the date of the judgment. The judgment against the defendant Bobst for the full amount of the unpaid portion of the indebtedness in the sum of $799.07 and interest, together with costs of suit, should remain unchanged.

The judgment for a lien against the defendant Janiss is therefore modified to secure payment of the sum of $423.74 and interest, as suggested. As so modified, the judgment is affirmed, costs on appeal taxed to each party.

We concur: PULLEN, P. J.; PLUMMER, J.

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25 Cal.App.2d 589

PEOPLE v. PETREWYMER.

Cr. 1609.

District Court of Appeal, Third District, California.

April 4, 1938.

Criminal law 🔑1182

Where transcript was filed on appeal and cause was regularly placed on calendar for oral argument and no brief was filed in behalf of appellant, who made no appearance at the time the case was called for a hearing, conviction would be affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Stanislaus County; R. B. Maxey, Judge.

R. G. Petrewymer was convicted of issuing a bank check with intent to defraud, and he appeals.

Affirmed.

E. H. Zion, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Stanislaus county of the crime of issuing bank check with intent to defraud, a felony.

The transcript on appeal was filed in this court January 20, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on April 4, 1938. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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25 Cal.App.2d 587

AMERICAN TRUST CO. v. GREUNER.

Civ. 10550.

District Court of Appeal, First District, Division 2, California.

April 4, 1938.

Hearing Denied by Supreme Court June 2, 1938.

Stipulation 🔑14(5)

In action upon rejected claim against estate, stipulation by parties after filing of answer providing that trial should remain in abeyance until a decision was rendered by the appellate court on the appeal from the judgment obtained by claimant against deceased waived defendant's right to claim that the judgment on the claim was not final and that hence the suit was prematurely brought.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the American Trust Company against Philip Greuner, as special administrator of the estate of W. M. Greuner, deceased, on a rejected claim. Judgment for plaintiff, and defendant appeals.

Affirmed.

Alfred Nelson, of Oakland, for appellant.

Ben F. Woolner and John H. Tolan, both of Oakland, for respondent.

SPENCE, Justice.

Plaintiff brought this action against defendant as special administrator upon a rejected claim. The trial court entered judgment directing that the claim be paid in due course of administration and, from said judgment, defendant appeals.

The amended complaint was filed in December, 1934. It appears therefrom that plaintiff had obtained a judgment against deceased in 1933; that after the death of the deceased plaintiff had duly presented its claim, based upon said judgment, to defendant as special administrator; and that defendant had rejected said claim. The answer of defendant, filed in February, 1935, contained certain denials and presented the special defense that an appeal had been duly taken from said judgment; that said appeal was still pending; and that the judgment was not a final judgment. After the filing of the answer and in April, 1935, the parties entered into a written stipulation providing "that the trial of the above entitled cause may remain in abeyance until there has been a decision rendered by the Appellate Court in the matter of the appeal from the judgment upon which the above entitled action is based." The decision was rendered affirming the judgment on April 17, 1936 (American Trust Co. v. Greuner, 13 Cal.App.2d 279, 56 P.2d 967), and the remittitur was filed on July 3, 1936. The present action was tried on November 2, 1936. The entire proceedings on the trial, exclusive of the copies of the exhibits, are transcribed on less than four pages of the typewritten transcript. The record on the probate proceedings and the record of the former action were introduced in evidence together with testimony to the effect that no part of the judgment had been paid. Defendant made no objection of any kind, did not cross-examine plaintiff's witness, and did not offer any evidence. Defendant waived findings and judgment was entered in favor of plaintiff as above indicated.

Appellant's demand for a reversal is based solely upon the contention that the judgment in the first action, upon which the claim against the estate was based, was not a final judgment at the time this action was commenced and that therefore this action was prematurely brought. We believe there are several answers to this contention, but it is sufficient to state that in our opinion appellant waived the right to raise this question by entering into the written stipulation above set forth. If appellant desired to urge the special defense that the action was prematurely brought because the judgment was not final when the action was commenced, there was no purpose in stipulating for the delay of the trial until the judgment had become final. The stipulation for allowing the trial of the cause to "remain in abeyance" in the meantime must be construed as an implied agreement for the waiver of the alleged special defense that the action had been prematurely brought. It is apparent from a reading of the proceedings on the trial that the parties themselves construed the stipulation as having that effect.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

RIDEAUX v. TORGRIMSON. *

Civ. 11706.

District Court of Appeal, Second District, Division 2, California.

March 30, 1938.

Hearing Granted by Supreme Court May 26, 1938.

1. Workmen's compensation 🔑2084

The section of Compensation Act providing that where payment of compensation is not secured, an injured employee may bring a law action against his employer, does not give any additional right over rights which employee had before adoption of act, nor does it create any new cause of action in his favor, but it simply permits employee to pursue the same remedy that he had before enactment of act. Gen.Laws 1931, Act 4749, § 29(b).

2. Abatement and revival 🔑54

In absence of statute expressly providing for the survival of a cause of action for personal injuries, it abates on death of tort-feasor.

3. Workmen's compensation 🔑2122

An employee who was injured in the course and scope of employment as a result of negligence of a deceased employer, who had failed to secure payment of compensation as required by statute, could not maintain an action for damages against legal representative of employer's estate, in absence of statutory authority providing for the survival of such a cause of action, and particularly in view of statute permitting an employee to proceed before the Industrial Accident Commission against the estate of an employer who dies after injury was sustained. Gen.Laws 1931, Act 4749, §§ 17(d), 29(b).

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Personal injury action by Maxine D. Rideaux against John Torgrimson, Jr., as administrator of the estates of John Torgrimson, deceased, and Anna Torgrimson, deceased. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Aaron Sapiro, Samuel De Groot, Samuel A. Rosenthal, and Burton Briggs Crane, all of Los Angeles (Burton Briggs Crane, of Los Angeles, of counsel), for appellant.

W. M. Greathouse, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of dismissal entered after the court sustained a demurrer to plaintiff's second amended complaint without leave to amend in an action against the administrator of the estate of decedents to recover damages for personal injuries, plaintiff appeals.

The amended complaint substantially alleged that:

(1) August 5, 1936, defendant was appointed and qualified as the administrator of the estate of John Torgrimson, deceased, and Anna Torgrimson, deceased.

(2) July 3, 1936, plaintiff was employed by decedents.

(3) July 3, 1937, while employed by decedents and while acting within the scope and course of her employment, plaintiff received personal injuries as a result of the negligent and careless operation of an automobile by John Torgrimson.

(4) John Torgrimson and Anna Torgrimson died as a result of injuries received in the accident which caused injury to plaintiff.

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*For subsequent opinion see 86 P.2d 826.

(5) Decedents had not at the time of plaintiff's employment or at the time of the accident complied with the provisions, rules, and regulations of the "Workmen's Compensation, Insurance and Safety Act" by securing to plaintiff as their employee compensation under said act.

This is the sole question presented for determination: *Is an injured employee entitled to maintain an action for damages against the legal representative of a deceased employer's estate, where the employee sustains injury while acting within the course and scope of the employment, as a result of the deceased employer's negligence, who at the time of the accident and injury to employee failed to secure to said employee the payment of compensation as required by the "Workmen's Compensation, Insurance and Safety Act"?*

This question must be answered in the negative. Section 29(b) of the "Workmen's Compensation, Insurance and Safety Act" reads as follows: *"Proceedings where payment is unsecured.* If any employer shall fail so to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition thereto, such injured employee or his dependents may bring an action at law against such employer for damages, the same as if this act did not apply, and shall be entitled in such action to the right to attach the property of the employer, at any time upon or after the institution of such action, in an amount to be fixed by the court, to secure the payment of any judgment which may ultimately be obtained. Such judgment shall include a reasonable attorney's fee to be fixed by the court. The provisions of the Code of Civil Procedure, except in so far as they may be inconsistent with this act, shall govern the issuance of and proceedings upon such attachment; provided, that if as a result of such action for damages a judgment is obtained against such employer in excess of the compensation awarded under this act, the compensation awarded by the commission, if paid, or if security proved by the court be given for its payment, shall be credited upon such judgment; provided, further, that in such action it shall be presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof shall rest upon the employer, to rebut the presumption of negligence. In such proceeding it shall not be a defense to the employer that the employee may have been guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. No contract, rule or regulation shall be allowed to restore to the employer any of the foregoing defenses." Vol. 2, Deering's Gen.Laws, p. 2298, Act 4749 (1931).

In the instant case the provisions of the foregoing act were applicable to the situation, because it is conceded that the decedent employers failed to secure to plaintiff the payment of compensation as required by section 29, subsection (a) of the "Workmen's Compensation, Insurance and Safety Act," supra.

[1] It therefore becomes necessary to determine the rights secured to plaintiff by subsection (b) of section 29 of said act, supra. The act is clear and unequivocal in its terms on this subject. The rule is clearly stated in the act to be as follows:

If any employer fails to secure, as provided in the act, the payment of compensation to an employee, any injured employee or his dependents may, in addition to filing an application for compensation with the Industrial Accident Commission, *"bring an action at law against such employer for damages, the same as if this act did not apply."* Section 29, subsec. (b), Workmen's Compensation, Insurance and Safety Act, supra.

It is clear that the act does not give any additional right or rights to the employee over those which he had prior to the adoption of the act, nor does it create any new cause of action in his favor. It simply permits him to pursue the same remedy that he had prior to the enactment of the "Workmen's Compensation, Insurance and Safety Act." This construction of the foregoing section of the "Workmen's Compensation, Insurance and Safety Act" finds support in the views of our Supreme Court expressed in the case of De La Torre v. Johnson, 200 Cal. 754, at page 759, 254 P. 1105, 1107, where, in construing section 26 of the "Workmen's Compensation, Insurance and Safety Act," Mr. Justice Seawell says: "Appellant relies strongly upon that portion of section 26 of the act which reads: 'The death of the employee, or any other person, shall not abate any right of action established by this section.' The section above cited must be construed in connection with and with reference to the subject-matter of the act and its manifest object. Its sole and primary object is to fasten a liability on 'all employers to compensate their employees for any injury incurred by said employees in the course of their employment, irrespective of the fault of either party.' Article 20, § 21, Const. The compensation provided for in said act is not damages in the sense that the latter term is used in ordinary tort actions. The right to recover damages for personal injury is not a right of action established by the Workmen's Compensation, Insurance and Safety Act, but a common right established long before the adoption of the Workmen's Compensation Act. The clause providing that the 'death of the employee, *or of any other person,* shall not abate any right of action *established* by this section,' read in the light of the purpose of the act, must be construed to apply to those persons whose right or liability is established by the act. It was the new rights and liabilities created by the Compensation Act which before were nonexistent that were the concern of the lawmakers in framing the act. The rights of the employee, when he steps outside of the Compensation Act and elects to sue a tort-feasor who is not his employer, are not enlarged beyond those given to citizens generally. * * * In addition to the common-law right of action to recover for personal injuries wrongfully inflicted, an employee, as such, is entitled to the protection provided by the act, and, while he has a twofold remedy, his common-law right is not enlarged by the provisions of the Workmen's Compensation Act."

[2, 3] It is thus necessary to decide whether plaintiff's complaint, as amended, stated a cause of action without reference to the "Workmen's Compensation, Insurance and Safety Act." The law is settled that a cause of action for personal injuries, in the absence of a statute expressly providing for its survival, abates upon the death of the tort-feasor. De La Torre v. Johnson, 200 Cal. 754, 757, 254 P. 1105; 1 C.J.S., Abatement and Revival, 196, § 143 (1936); I Cal.Jur. 71, § 41 (1921); 1 Cal. Jur. Ten-Year Supp. 10, § 41 (1936). Since the complaint as amended alleged the death prior to the institution of the action of the tort-feasors, it did not under the foregoing rule state a cause of action, as there is no express statutory authority providing for the survival of such a cause of action.

It is apparent that the state Legislature intended that section 29, subdivision (b), supra, receive the construction which we have placed thereon, because adequate protection for the injured employee in a case like the instant one is provided by section 17(d) of the act, which reads as follows:

"(d) *Death of employer.* The death of an employer subsequent to the sustaining of any injury by an employee shall not impair the right of such employee to proceed before the commission against the estate of such employer, and the failure of such employee or his dependents to cause the claim to be presented to the executor or administrator of the estate shall not in any way bar or suspend such right." Deering's Gen.Laws, vol. 2, p. 2289, Act 4749, § 17 (1931).

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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25 Cal.App.2d 525

PEOPLE v. TAYLOR.

Cr. 358.

District Court of Appeal, Fourth District, California.

March 29, 1938.

Rehearing Denied April 13, 1938.

1. Infants 🔑20

Testimony of young boys, though inconsistent in immaterial matters, *held* to authorize conviction of contributing to delinquency of a minor, on issue of identity of defendants. St.1915, p. 1225, as amended.

2. Criminal law 🔑878(4)

A verdict acquitting defendant on charge of committing specified lewd or lascivious acts upon boy and convicting same defendant on second charge of contributing to minor's delinquency by acts other than acts specified in first charge, proof of which would not have supported conviction on first charge, was not inconsistent so as to require a reversal of conviction. Penal Code, § 288, as amended by St.1933, p. 1028; St.1915, p. 1225, as amended.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Lawrence Taylor was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

LeRoy Anderson, of Costa Mesa, and Z. B. West, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with violating section 288 of the Penal Code, as amended by St.1933, p. 1028, by performing certain described acts upon and with a boy of the age of 12 years, and in a second count with violating the Juvenile Court Law, St.1915, p. 1225, as amended, by contributing to the delinquency of this minor by doing certain other acts. A jury found him not guilty of the charge of violating section 288 of the Penal Code, as amended, and guilty of the contributing charge. From the judgment entered he has appealed.

From the evidence for the prosecution it appears that the boy in question was selling magazines in Newport Beach on June 22, 1937; that the appellant, who was a real estate agent, came along in an automobile and asked him where Costa Mesa was; that the boy lived in Costa Mesa and the appellant asked him to ride there with him, which he did; that the boy showed the appellant the house where he lived, but the appellant asked him to ride further with him; that the appellant drove over some country roads and, after showing the boy some land which he stated that a man wanted to have sold, finally stopped the car and the events involved in the first count of the information there took place; that the appellant then took the boy to a place near his home; and that he then asked the boy what magazine he was selling and on being told it was the Saturday Evening Post the appellant bought one, giving the boy a dime and telling him to keep the change. Two or three days later the appellant, in the same car, again approached this boy and asked him to take a ride, which he refused to do. At that time the boy was with his brother, and after the appellant left he told the brother what had occurred a few days before. The boys went home and told their mother and she advised them to watch and get the license number of the car. A few days later, while in company with his two brothers, the boy in question again saw the appellant driving the same car. The appellant addressed the boy by his first name and asked if he was still selling magazines and receiving a negative answer offered the boy a ride, which was refused. While this conversation was going on one of the brothers went behind the car and wrote the license number on the ground with a stick. The boys went home and gave the license number to their mother, who wrote it on a piece of paper. This was turned over to the officers and through that number the residence of the appellant was found. The boys were taken there by the officers and identified the appellant and the car as the person and car they had previously seen. Before that time the boys had given the officers a good description of the appellant and of the car.

[1] It is first contended that the evidence was insufficient to sustain the judgment because the testimony of the complaining witness and of one of his brothers was so uncertain, contradictory, and unreasonable as to be unworthy of belief. In support of this contention it is pointed out that the complaining witness testified that his birthday was on June 30, while his mother testified that he had made a mistake and that it was on April 30; that he did not know the names of certain streets or certain directions; and that he testified that on the occasion in question he was selling the Saturday Evening Post and did not have the Liberty Magazine, but later stated that he did not know whether he was selling Liberties or Saturday Evening Posts at that time. It is also argued that the brother of the complaining witness, who gave an excellent description of the man who asked the complaining witness if he was still selling magazines and who then asked him to take a ride with him, could not have been telling the truth because in another place in the transcript it appeared that he testified that he did not get a chance to look at the man who was driving the car. It clearly appears that he testified that he did not get a chance to look at the man the first time he saw this man in the car, which was the second time the complaining witness was accosted and asked to ride. His description related to the third time the complaining witness was asked to take a ride, when all three of the brothers were present, and there is no inconsistency or uncertainty in any portion of this witness' testimony. While there are a few inconsistencies in the testimony

of the complaining witness none of these are on material matters. We find nothing in the record of the testimony of that witness which seems unreasonable, especially in view of the boy's age, or which brands it as unworthy of belief. The jury believed at least a part of that testimony and this is entirely sufficient to support the judgment entered.

[2] The only other point raised is that the verdict is inconsistent and conflicting. It is argued that the evidence in support of both charges is identically the same and that since the jury acquitted him on the first charge it necessarily follows that there is no basis for his conviction on the second charge. This argument is entirely without merit since the specific acts alleged and proved in connection with the second charge are entirely separate and distinct from those alleged and sought to be proved in connection with the first charge, although they occurred on the same trip, and they are acts which would not have supported a conviction on the first charge.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 603

WRIGHT v. SELLERS.

Civ. 1861.

District Court of Appeal, Fourth District, California.

April 5, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Appeal and error 🔑930(1)

In reviewing evidence, the Court of Appeal must accept those facts as true which tend to support the verdict and judgment and resolve all conflicts in the evidence in favor of the successful party.

2. Automobiles 🔑158

Automobile accident cases involving willful misconduct must each depend largely on their own facts for correct decision.

3. Automobiles 🔑181(1)

"Willful misconduct," within automobile guest statute, is the intentional doing of something in operation of a motor vehicle which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that an injury to a guest will be a probable result. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

4. Negligence 🔑11

The mere failure to perform a statutory duty is not alone "willful misconduct," but amounts only to "simple negligence," since to constitute "willful misconduct" there must be actual knowledge, or its equivalent, of peril to be apprehended from failure to act, coupled with conscious failure to act to the end of averting injury.

[Ed. Note.—For other definitions of "Simple Negligence," see Words & Phrases.]

5. Automobiles 🔑181(1)

"Willful misconduct," within automobile guest statute, implies at least the intentional doing of something either with knowledge that serious injury is probable result, or with wanton and reckless disregard of possible results. St.1935, p. 154, § 403.

6. Automobiles 🔑181(7)

Mere speed, of itself, generally does not constitute "willful misconduct," within the automobile guest statute. St.1935, p. 154, § 403.

7. Automobiles 🔑245(24)

In action for injuries sustained by guest when host drove automobile almost 70 miles per hour so that automobile left road at curve because of excessive speed, where guest had remonstrated with host as to speed, and shoulders of the road were wet and soft, question of host's willful misconduct was for jury.

8. Automobiles 🔑224(5)

In action for injuries sustained by guest when host's automobile left road while host attempted to negotiate a curve at almost 70 miles per hour, where guest had protested excessive speed, and host stated that host was a good driver and knew the road, guest's reply of, "Maybe so," was not a withdrawal of guest's protest so that guest thereby assumed risks incident to the speed, especially in view of fact that guest's remark was made at a point several miles from scene of accident. St.1935, p. 154, § 403.

9. Automobiles ⚷224(5)

In action for injuries sustained by guest when host's automobile overturned on curve because of excessive speed of almost 70 miles per hour, where guest asked host to decrease speed, and host replied that they should hurry, that his wife could drive on return trip and they could sleep on rear seat, statement of guest that, "That part is sure fine, I wouldn't mind a little sleep now," was not a consent to manner in which automobile was driven so as to relieve host from liability for willful misconduct. St. 1935, p. 154, § 403.

10. Automobiles ⚷181(1), 242(1)

To establish "willful misconduct" of host, within automobile guest statute, it is not necessary that an actual, executed intent to injure the guests be proved by parol evidence, although such a proved intent, if carried out, would constitute "willful misconduct." St.1935, p. 154, § 403.

11. Automobiles ⚷181(1)

"Willful misconduct," within automobile guest statute, requires an intentional conscious act of omission or commission of the driver under circumstances disclosing a knowledge that injury to guest would be a probable result, or under circumstances from which such knowledge on part of driver might be inferred, and actual intent to injure is not necessary element of which positive evidentiary proof must be produced, but the intent may be implied from the surrounding circumstances. St.1935, p. 154, § 403.

12. Automobiles ⚷181(1)

The intent required for willful misconduct, within automobile guest statute, is sufficiently shown if the act, or failure to act, is done under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result. St. 1935, p. 154, § 403.

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Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by A. C. Wright against Milton Sellers for injuries sustained when defendant's automobile, in which plaintiff was a guest, overturned. Judgment for plaintiff for $1,250, and defendant appeals.

Affirmed.

W. H. Stammer and Galen McKnight, both of Fresno, for appellant.

Martin C. Thuesen, of Fresno, for respondent.

MARKS, Justice.

Plaintiff, a guest in defendant's automobile, brought this action for personal injuries which he suffered in an automobile accident on the Mother Lode highway about three miles north of Plymouth, Cal. He recovered judgment in the sum of $1,250, and defendant has appealed from the judgment and from the order denying his motion for judgment notwithstanding the verdict.

[1] The facts of the case are not in serious dispute, except as to a few details. In reviewing them we must, in accordance with familiar rules, accept those as true which tend to support the verdict and judgment and resolve all conflicts in the evidence in favor of the plaintiff, the successful party.

On February 26, 1936, plaintiff and defendant were friends of about two years standing. Both were peace officers. Defendant owned a practically new Buick automobile. His wife was in Placerville, Cal., distant from Fresno, Cal., about two hundred twenty-one miles. He invited plaintiff to accompany him on a trip to Placerville to bring Mrs. Sellers back to Fresno. The two men left Fresno at about 10 o'clock on the morning of February 26, 1936. It was necessary that they return to Fresno by 12 o'clock midnight of the same day as one of the officers had to go on duty at that hour.

The trip from Fresno to Ione was uneventful. After leaving Ione defendant increased his driving speed. Plaintiff remonstrated with him, without effect, for driving at this increased speed which plaintiff estimated at between sixty-five and seventy miles an hour.

Plaintiff described the occurrences just before the accident as follows:

"A. After we left Plymouth is when he commenced stepping on it.

"Q. What do you mean by that? A. Speeding.

"Q. And did you say anything then? A. I did.

"Q. What did you say? A. I told him to slow down, we would not get there, we would get there all mixed up, if we didn't. And he said, 'No, I know the road.'

"Q. And when was that with respect to the time when the car turned over? A. After that, in the same—during the same conversation he says, 'We must hurry on and get a bite to eat. My wife is a good driver and she will drive us back, and we will pile up in the back seat and go to sleep.' And at that time I turned by head and looked at him driving and I said, 'That part of it is sure fine, I wouldn't mind having a little sleep right now.' And everything turned black. I knew nothing more.

"Q. Now just before, immediately prior to the time that you told Mr. Sellers to slow down, immediately prior to the accident, had you determined at what speed the automobile was going? A. I hadn't noticed the speed so much. I knew we were traveling fast. I happened to look down at the speedometer and it was nearly seventy miles an hour.

"Q. And is that when you made the statement to Mr. —— A. When I asked him to slow down, we would get there in pieces if he didn't."

Defendant described the road north of Plymouth and the events preceding the accident as follows:

"Q. When you left Plymouth, what is the nature of the Mother Lode road there? A. Well it is slightly down hill and not quite as good a road.

"Q. Is it down hill all the way to the place where the accident happened? A. I believe so.

"Q. And is it straight or does it have turns? A. It has turns.

"Q. It has turns. Were you familiar with that road? A. I was.

"Q. You had driven it before? A. I had.

"Q. Did Mr. Wright say anything to you about the—strike that. What speed did you drive when you left Plymouth? A. Oh, around sixty miles an hour.

"Q. Mr. Wright make any statement to you concerning the speed you were driving at that time? A. Just prior to the accident he asked me to slow down.

"Q. At that time—about how long before the accident would you say, immediately prior? A. Well practically immediately prior, I would say a few seconds.

"Q. And at that time isn't it a fact that you told him not to worry, that, 'I know this road'? A. I did. * * *

"Q. And will you tell us what happened just after Mr. Wright made that statement to you or asked you to slow down and you told him that you knew the road and not to worry about it. Tell us what happened immediately afterwards. Did you slow down? A. No, I did not.

"Q. Then what happened? A. Well as near as I can remember there was a slight turn in the road to the left and when we came upon this turn the two wheels on the right of the automobile got onto the shoulder of the road which was soft on account of the rain and it slipped around sideways and turned over.

"Q. Now was this road turning to the left or to the right at that place? A. To the left.

"Q. To the left? A. Yes.

"Q. And do you know what caused the automobile to get off onto the soft shoulder of the road? A. Well it was the turn, is all, I guess.

"Q. Did you attempt to keep the automobile on the paved portion of the road? A. I did.

"Q. Were you able to do so? A. I wasn't. * * *

"Q. Was there any mechanical defect with the automobile? A. No, there wasn't.

"Q. The automobile was in good mechanical condition? A. It was.

"Q. Will you explain to the jury just how the accident happened, please? A. Well after we left Plymouth I was going down a slight grade traveling about sixty miles an hour, between sixty and sixty-five, and came to this turn and I couldn't make the turn, and it got off on the soft shoulder there and slid around sideways and turned over.

"Q. You say you couldn't make the turn? A. No.

"Q. What do you mean by that? A. I was going too fast. * * *

"Q. What happened after the automobile you were driving got off the road then? A. Turned over.

"Q. Do you know how many times? A. I believe three. Three or four."

It is established by the evidence that the roadway had a hard oiled surface about eighteen feet wide with a three-foot dirt shoulder on each side; that it had been raining; that the hard surface of the roadway was dry but that the shoulders were wet and soft.

The degree of the turn in the road at the place of the accident is not in the record. Defendant testified that he could see the road ahead for one or two hundred yards.

As we must accept the evidence most favorable to plaintiff, we must conclude that defendant's vision of the road ahead extended only one hundred yards. Some idea of the sharpness of the curve is evidenced by the fact that a roadway twenty-four feet wide disappeared from the view of defendant in one hundred yards. While such a curve might not be called sharp, it was at least a distinct curve.

Plaintiff testified that immediately before the accident defendant was driving nearly seventy miles an hour. We must conclude that the rate of travel was slightly less than that figure.

From the foregoing facts the jury impliedly found that defendant was guilty of willful misconduct. If, as a matter of law, that implied finding is not supported by material and competent substantial evidence the judgment must be reversed. If, on the other hand, that evidence justified the conclusion of willful misconduct, it must be affirmed.

[2] Starting with Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279, the books are full of motor vehicle accident cases involving willful misconduct. As each case must depend to a large extent on its own facts for correct decision, little benefit could be derived from our reviewing many of them. On the one hand are numerous cases in which the appellate and Supreme Courts found no difficulty in holding that the acts of a driver of an automobile constituted willful misconduct. On the other hand are an equal, if not a greater number of cases where the acts relied upon were held, as a matter of law, not to constitute willful misconduct. Between these two fairly well defined zones of decision appears another class composed of what may be called border line cases. It should be observed that the instant case belongs in the last class. In this class of cases, frequently, though not always, it has been held that the question of the existence of willful misconduct is one of fact addressed to the trier of fact and not one of law for the appellate court.

[3-5] Willful misconduct has been defined by the Supreme Court in Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, as follows:

"The phrase 'willful misconduct,' as employed in our so-called guest statute [St. 1923, p. 517, § 141¾, as added by St.1929, p. 1580, as amended by St.1931, p. 1693, now St.1935, p. 154, § 403], has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, wherein it is declared that '"willful misconduct", within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'

"The case of Howard v. Howard, 132 Cal.App. 124, 128, 22 P.2d 279, after defining gross negligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, declares that: '"The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." * * *

"'Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.'"

See, also, Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430.

The facts of the instant case cannot be distinguished in principle from those of Jackie Coogan Productions, Inc., v. Industrial Accident Commission, Cal.App., 68 P.2d 750, 753, and Fisher v. Zimmerman, Cal.App., 73 P.2d 1243, 1246. In both those cases this court held the findings of willful misconduct were supported by the evidence. In both cases petitions for hearing in the Supreme Court were denied. In both cases another motor vehicle was present at the scene of the accident, the speeds were somewhat higher, and in the Coogan Case the curve slightly sharper than in the present case. There was no other vehicle near the scene of the accident in the instant case. We cannot regard those factual differences sufficient to distinguish the cases in principle.

In the Coogan Case it was said:

"'The question of whether the minor defendant was or was not guilty of willful misconduct is essentially one of fact for determination by the fact finder. Appellants extensively review many cases involving willful misconduct, calling our attention in their review that the facts in the instant case are similar to facts in some cases where judgment went for plaintiff, and that they are dissimilar to facts in other cases where defendant prevailed. It must be borne in mind, of course, that the interpretation to be given actions and conduct must turn on the circumstances of the individual case, and that decisions passing upon facts constituting, or failing to constitute, willful misconduct, can be of little assistance, other than to announce the definition of that term. It is our duty on appeal to indulge in all reasonable inferences to support the findings and judgment.' [Medberry v. Olcovich, 15 Cal.App. 2d 263, 59 P.2d 551, 60 P.2d 281].

"While the question before us is rather close we think it is primarily one of fact and that the evidence in its entirety, with the reasonable inferences therefrom, is sufficient to sustain the finding of the commission. The point where the accident occurred was within 2 miles of this ranch. It appears from the evidence that John H. Coogan had taken a number of trips which necessarily took him over this route and he must have been familiar with the fact that it was a mountain road with many turns. It appears, without conflict, that he was driving at an excessive rate of speed at two points a few miles away from the scene of the accident and there is ample evidence that just before the accident happened he rounded a turn in the road where vision was limited to 100 feet at an excessive rate of speed. The evidence justifies the inference that his speed while rounding that turn was inherently and extremely dangerous under the conditions there existing and that he knew or should have known that injury to others was probable. Assuming that the evidence might have justified a different conclusion, we think it may not be held, as a matter of law, that this fact-finding body exceeded its jurisdiction in viewing the evidence, with its reasonable inferences, as disclosing serious and willful misconduct on the part of the driver of the car."

In the Fisher Case it was said: "Generally speaking, it is the rule in California that the question of the existence of willful misconduct is usually one of fact addressed to the trier of fact and not one of law addressed to the appellate court. Del Bosque v. Singh, 19 Cal.App.2d 487, 65 P.2d 951; Jackie Coogan Productions, Inc., v. Industrial Accident Commission, Cal. App., 68 P.2d 750; Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281. In the instant case this question as one of fact was first addressed to the jury at the close of the trial, and next to the trial judge on the motion for new trial. If the evidence which we have quoted would support a finding of willful misconduct on the part of defendant, the order granting the motion for new trial must be affirmed.

[6] "It is generally held that mere speed, of itself, does not constitute willful misconduct. This may not always be true. There may be a point at which the speed becomes so excessive, the danger of injury to the passenger so probable, that such extreme speed alone might be held to be willful misconduct. Speed coupled with other circumstances has been held to constitute willful misconduct. Petersen v. Petersen, 20 Cal.App.2d 680, 67 P.2d 759.
* * *

"We believe that the evidence we have quoted would support a finding of willful misconduct if one had been made in the trial court. * * * The condition of the oiled road with its dips and soft shoulders, coupled with the excessive speed at which defendant drove his automobile in the face of an approaching car, are circumstances which made injury to the passengers not an improbable result."

[7] When we apply the rules announced in the Meek, Coogan, and Fisher Cases to the facts in this case, we conclude that the implied finding of the jury that defendant was guilty of willful misconduct has support in the evidence. He was familiar with the road. In the face of remonstrances on the part of plaintiff, he drove his car at almost seventy miles an hour into a curve. He said himself that the speed was so great that he could not hold his automobile on the paved portion of the road. He knew it had been raining and that the shoulders of the road

were wet and soft. Any experienced driver knows the extreme likelihood of a bad skid when an automobile hits wet dirt at a high rate of speed. A skid at almost seventy miles an hour is always dangerous. These facts, namely, that defendant drove his automobile at a speed of almost seventy miles an hour into a curve, when the shoulders of the road on each side of an eighteen-foot pavement were wet and soft, justified the conclusion of the jury that he either knew or should have known that a serious accident and injury to his guest would be probable results.

Defendant relies upon the cases of McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189, 192, and Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948, as establishing, as a matter of law, that willful misconduct was not proved in the instant case. The cases are distinguishable. See Parsons v. Fuller, supra.

In the McLeod Case the defendant host driver passed another car on a highway at a speed of about seventy-three miles an hour. He returned to his own side of the road and found a third automobile across the highway in front of him. He saw this third car when it was too close for him to stop and a collision ensued. It is clear from the opinion that the court reached the conclusion that there was no willful misconduct because defendant was unaware of the presence of the third car in time to stop. In the course of its opinion the court remarked:

"There is nothing in the evidence disclosing that when he attempted to pass the Packard car he knew, or had any reason to know, that the Dodge car was a short distance ahead on his left hand side of the road and in a position practically broadside to the course of travel.

"Whatever might be the force and effect, in an action based on simple negligence or gross negligence, of Barbara's caution about fast driving and to slow down, it is clear from what has been said that such evidence did not prove nor tend to prove knowledge of the presence of the Dodge car nor its position."

The effect of the holding in the McLeod Case is that a speed of seventy-three miles an hour on a country highway is not of itself sufficient to constitute willful misconduct. The inference is clear that had Dutton known in time of the presence of the other car across the highway in front of him the decision on appeal might have been different. Thus the rule is there applied that to make him guilty of willful misconduct he either must have known, or should have known, of impending danger which would make injury to his guest probable.

In the Hall Case it appears that Mrs. Mazzei attempted to pass an automobile traveling ahead of her. In passing she speeded her car up to about sixty miles an hour. There were soft shoulders on either side of the pavement. The pavement was of sufficient width to have permitted her to pass in safety had she stayed on it. In some unexplained manner she drove off the pavement and the accident followed. The highway was straight and dry at the place of the accident. The court was of the opinion that her act of permitting her car to run off the pavement onto the soft shoulder, not her act of passing the other car at sixty miles an hour, was the proximate cause of the accident, and that under the evidence this was a careless act and not a willful act. Independent of any of the reasoning and argument of this court in the Hall Case, the ultimate decision there may be properly supported by the recent case of Weber v. Pinyan, Cal.Sup., 70 P.2d 183, 112 A.L.R. 407.

[8] Defendant urges that plaintiff assented to the speed at which the automobile was driven and therefore voluntarily assumed the risks incident to such speed. He points to two remarks of plaintiff upon which he relies to establish this acquiescence. The first was made at a point about four miles south of Plymouth and six or seven miles from the place of the accident when plaintiff remonstrated at the speed. Defendant replied that he was a good driver and knew the road, to which plaintiff replied, "Maybe so." This should not be construed as a withdrawal of the protest as to speed. Further, we are not informed of the condition of the road at the point of this protest. We know that the condition of the road was worse north of Plymouth and the speed of the car there was greater. Even though the protest at the speed of the car south of Plymouth were withdrawn, it would not be a consent to a higher speed under different conditions north of Plymouth.

[9] Earlier in this opinion we quoted the conversation immediately prior to the accident. Defendant relies upon this conversation to establish plaintiff's consent

to the manner in which the car was being driven. We cannot see any such consent from the remark made by plaintiff. Rather it was a consent to the plan for the return trip during which Mrs. Sellers would drive and the two men would sleep on the back seat.

Lastly, defendant contends that his own evidence absolves him from the charge of willful misconduct. He testified that he and plaintiff were friends; that he thought he was driving safely; that he had no intention of causing an accident or of injuring his friend.

[10-12] To establish willful misconduct it is not necessary that an actual, executed intent to injure the guests be proved by parol evidence. Such a proved intent, if carried out, would constitute willful misconduct. When the definition of willful misconduct already quoted (Meek v. Fowler, supra) is separated into its component parts it appears that it is necessary that there be an intentional (conscious) act on the part of the driver; that this act may consist in doing something that should not be done, or in failing to do something that should be done; that this intentional act, or intentional failure to act, must be under circumstances disclosing a knowledge on the part of the driver that an injury to his guest would be a probable result, or under circumstances from which such knowledge on the part of the driver might be inferred. The consciousness must relate to the intentional act done, or to the intentional failure to act. The intent may be implied from the surrounding circumstances. An actual intent to injure is not a necessary element of which positive evidentiary proof must be produced. Such proof would rarely be possible. Few drivers would confess to the intent to injure a passenger. It is sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result, for again, positive evidentiary proof of such knowledge would be an impossibility in most cases. Jones v. Hathway, Cal.App., 70 P.2d 681.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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25 Cal.App.2d 555

FOOTHILL DITCH CO. v. WALLACE RANCH WATER CO. (two cases).

Civ. 1828, 1829.

District Court of Appeal, Fourth District, California.

March 31, 1938.

Rehearing Denied April 28, 1938.

Hearing Denied by Supreme Court May 26, 1938.

1. Waters and water courses ⚷257(1)

Where superior court's judgment quieting title to water and an interest in ditch and flumes in consumer and annulling Railroad Commission's order fixing rates to be charged by ditch company for transporting water was modified and affirmed by Supreme Court, judgment remained a judgment of the superior court, and it could not annul, modify, or set aside commission's order, as respects company's right to recover on basis of rates fixed, since only the Supreme Court has jurisdiction to annul an order of the commission. St.1933, p. 1157, § 67.

2. Waters and water courses ⚷257(1)

Fixing the amount of compensation payable to a ditch company for transporting water is a matter solely within jurisdiction of Railroad Commission, subject to review in appropriate proceedings by the Supreme Court. St.1933, p. 1157, § 67.

3. Judgment ⚷547

Where the Railroad Commission makes fact findings and an order after hearing in a matter in which it has jurisdiction of subject matter and parties, and order becomes final, a trial court cannot make findings contrary to those of the commission or render judgment modifying or nullifying its order, since the doctrine of res judicata extends to orders of the commission. St.1915, p. 115, as amended.

4. Public service commissions ⚷7

The primary jurisdiction to fix rates to be charged by public utilities is in the Railroad Commission and not in the courts. St. 1915, p. 115, as amended.

5. Waters and water courses ⚷257(1)

A ditch company's waiver, if any, of rights under earlier orders of the Railroad Commission, was not controlling in action to recover from consumer for services rendered in diverting water on basis of a later order fixing rates to be charged by company.

6. Waters and water courses ⚷257(1)

An adjudication of the Supreme Court upholding an order of the Railroad Commission fixing rates to be charged by ditch company to consumers for transporting water was final, as against contention that order was void on its face for uncertainty for failure to define exact service to be rendered by company in consideration for compensation to be paid to it.

7. Waters and water courses ⚷257(1)

Where ditch company rendered bill each month to consumer showing water furnished and charges for services and carried forward balance unpaid each month, and consumer accepted and used water delivered to it, a promise to pay could be inferred. Civ. Code, § 1589.

8. Account, action on ⚷17

A "book account" may consist of entries on one side only, but it cannot consist of numerous loose pages not bound together in some substantial form.

To constitute a "book" the pages must be fastened together with some degree of substantial permanency.

[Ed. Note.—For other definitions of "Book" and "Book Account," see Words & Phrases.]

9. Appeal and error ⚷991

In ditch company's action against consumer for services rendered in transporting water, whether records of water delivered and amount charged for delivery, assembled in a folder and introduced in evidence, were a book account, was for trial judge.

10. Appeal and error ⚷991

In ditch company's action against consumer for services rendered in transporting water, where trial judge considered books kept by company and permanency of their binding, finding that accounts kept were book accounts was conclusive on appeal, since what judge considered was evidence in the case.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Two consolidated actions by the Foothill Ditch Company against the Wallace Ranch Water Company to recover for services rendered in diverting water. From judgments for plaintiff, defendant appeals.

Affirmed.

McClure & Combs, of Visalia, and Freston & Files and James A. McLaughlin, all of Los Angeles, for appellant.

McFadzean & Crowe and James K. Abercrombie, all of Visalia, for respondent.

MARKS, Justice.

This opinion covers two consolidated actions to recover for services rendered in diverting water from the Kaweah river and transporting it through a conduit for a distance of about 4 miles to diversion points of Wallace Ranch Water Company. The two actions are identical except as to the time during which the water was diverted and transported and the amounts sought to be recovered. The Foothill Ditch Company had judgments in both actions and Wallace Ranch Water Company has appealed. The causes were tried together and are presented on a single reporter's transcript. They have been consolidated for the purpose of this appeal. Where necessary we will refer to the first action filed as the old case and the second action as the new case.

The original complaint in the old case is not in the record. We are informed by counsel that it was filed in 1931. In that action we have before us a first amended complaint which was filed on January 24, 1936. The first amended complaint sought to extend the period over which the services had been rendered and increase the amount of recovery. The trial court held that this was an attempt to state a new and separate cause of action which could not be set up in an amended complaint, and only allowed recovery for the services rendered from August 1, 1929, to June 30, 1931, which was presumably the period covered by the original complaint.

The complaint in the second case was filed on January 6, 1936, and sought recovery for services rendered in diverting and delivering the water for 4 years prior to that date.

At about the close of the trial both pleadings were amended to conform to the proof by the addition of the allegation in each that the accounts sued on were book accounts.

The facts are not in dispute. The controversy between the parties arises from a difference of opinion as to the proper interpretation of and construction to be placed upon orders of the Railroad Commission and the decision and judgment in the case of Wallace Ranch Water Company v. Foothill Ditch Company, 5 Cal.2d 103, 53 P.2d 929.

The parties have been engaged in litigation for a number of years. A complete statement of the historical facts is contained in the case of Wallace Ranch Water Company v. Foothill Ditch Company, supra. We will not repeat those facts but will confine ourselves to a statement of such additional facts as affect the present cases. A brief review of the orders of the Railroad Commission will be necessary.

Since at least April 20, 1915, and probably for a number of years prior to that date, Foothill Ditch Company has been a public utility engaged in diverting water from the Kaweah river and transporting it through ditches, flumes, and pipe lines to various consumers. The total length of the system is about 18 miles. Wallace Ranch Water Company receives its water out of a flume belonging to Foothill Ditch Company at a point about 4 miles below the intake so we need not concern ourselves with the balance of the distributing system.

On April 20, 1915, the Railroad Commission of California by its decision No. 2309 fixed the rates to be charged by Foothill Ditch Company for the services it rendered its consumers. A charge of 12 cents per miner's inch of flow of water for 24 hours was fixed for water delivered to all consumers, except Wallace Ranch Water Company's predecessor in interest, which was given the preferential rate of $5 per second foot flow of water per month.

On November 17, 1921, in its decision No. 9759 the Railroad Commission again fixed charges to be collected by Foothill Ditch Company at 14 cents for each miner's inch of flow of water for 24 hours for all consumers, except Wallace Ranch Water Company's predecessor, which was given the preferential rate of $6 per second foot flow of water per month.

Both the foregoing orders of the Railroad Commission became final. However, Wallace Ranch Water Company and its predecessor did not pay in full the rates fixed in either of the orders.

The matter of rates to be charged by Foothill Ditch Company again came before the Railroad Commission in 1928. The hearing resulted in decision No. 19964 which was rendered on June 29, 1928. A rehearing was granted because of no notice, or defective notice, given to Wallace Ranch Water Company and to the California Citrus Lands & Packing Company, one of its stockholders. A rehearing was held which resulted in decision No. 21249 rendered on June 18, 1929. 33 Op. & Orders of Ry.Com., p. 237. This order fixed the rates to be charged all consumers, including Wallace Ranch Water Company, at 14 cents per miner's inch flow of water for 24 hours.

The failure of Wallace Ranch Water Company to secure a preferential rate in this order and the insistence of Foothill Ditch Company that it pay the rate fixed by the Railroad Commission was evidently the cause of the litigation that followed.

Wallace Ranch Water Company being dissatisfied with the decision of the Railroad Commission filed a petition in the Supreme Court for a writ of review to review the decision. This petition was denied without opinion on August 12, 1929. See Wallace Ranch Water Company v. Ry. Com., S.F. No. 13580, Minutes of Supreme Court, 78 Cal.Dec. No. 4108. A petition for rehearing was denied by the Supreme Court on September 10, 1929. See, Minutes of Supreme Court, 78 Cal. Dec. No. 4116.

Wallace Ranch Water Company next filed an action in the United States District Court wherein it sought to have set aside the last order of the Railroad Commission. Judgment went for Foothill Ditch Company, defendant in that action, and the complaint was dismissed on the ground that the decision of the Supreme Court of California in denying the writ of review was res adjudicata. This judgment was affirmed on appeal. Wallace Ranch Water Co. v. Railroad Commission of California, 9 Cir., 47 F.2d 8, 9. In the course of its opinion the Circuit Court of Appeals for the Ninth Circuit said: "It is well settled that the denial of a petition for review by the Supreme Court of the state in this class of cases is in effect an affirmance of the order sought to be reviewed. Napa Valley Electric Co., v. R. R. Comm., (D.C.) 257 F. 197, affirmed under same title, 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310."

Wallace Ranch Water Company then instituted an action in the superior court of Tulare county against Foothill Ditch Company to quiet title to three second feet of water to be diverted from the Kaweah river and a one-third interest in the ditches and flumes in which the water was transported from the Kaweah river to the property of the Wallace Ranch Water Company. Wallace Ranch Water Company had judgment in that action. Besides quieting title to the water and interest in the ditch and flumes, the judgment in that case annulled the last order of the Railroad Commission, in so far as it sought to fix the rate to be charged for transporting the water, and ordered that the Wallace Ranch Water Company pay $150 per year for the services rendered. There was an appeal taken and this court reversed the judgment. Wallace Ranch Water Co. v. Foothill Ditch Co., 46 P.2d 252. A hearing was granted by the Supreme Court and the judgment of the superior court was modified and affirmed. Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal. 2d 103, 53 P.2d 929.

The next step in the litigation was filing the first amended complaint in the old case and the complaint in the new case. It is admitted that Foothill Ditch Company has diverted Wallace Ranch Water Company's water from the Kaweah river and delivered it through ditches and flumes; that all costs of repairing, maintaining, and reconstructing the diversion dams and the ditches and flumes, and cleaning the latter, have been paid by Foothill Ditch Company; that proper measuring devices have been installed; that the supervising engineer, ditch tenders, office employees, and all other laborers and employees have been paid by Foothill Ditch Company, as well as all other costs and expenses, without any contribution from Wallace Ranch Water Company, since the effective date of the Railroad Commission's order of June 18, 1929. It is also admitted that the judgments represent the total number of miner's inches per day of water delivered to Wallace Ranch Water Company since August 1, 1929, multiplied by 14 cents, plus legal interest, and less something over $2,000 of the claim which was barred by the statute of limitations. The judgments are based on the order of the Railroad Commission and are correct in their respective amounts if that order is controlling in these actions. It follows that, if Foothill Ditch Company is legally justified in charging Wallace Ranch Water Company the sum of 14 cents per miner's inch flow for a 24-hour day of water delivered to it, the judgments must be affirmed, if the accounts are book accounts and the 4-year statute of limitations applies here.

Wallace Ranch Water Company presents four grounds for reversal of the judgments which it states as follows:

"The easement and rights accorded to appellant by the Supreme Court nullify any contention that respondent can charge appellant rates for transporting appellant's water.

"Respondent waived any rights which it may have had under the 1929 order of the Railroad Commission.

"A second independent reason why respondent is not entitled to rely upon the 1929 order as a basis for recovery is that the service to be rendered by respondent is not sufficiently defined therein.

"There is no foundation for any recovery in assumpsit or on the common counts." We will consider these contentions in the order they are stated.

[1-4] Wallace Ranch Water Company's first ground of reversal is but an attack in a new form upon the order of the Railroad Commission of June 18, 1929. It argues that, since the Supreme Court has held in the case of Wallace Ranch Water Company v. Foothill Ditch Company, supra, that the plaintiff in that action (defendant here) was the owner of three second feet of the flow of the Kaweah river, when nine second feet flow was available to the parties, and further held that the corporation had an easement in the ditches and flumes of Foothill Ditch Company to transport its water, the order of the Railroad Commission is in effect annulled because Foothill Ditch Company cannot charge Wallace Ranch Water Company for services which it is given the right to perform for itself in delivering its own water. This argument is more ingenious than logical or forceful.

The Railroad Commission of California is established under the provisions of section 22 of the Constitution and the Public Utilities Act. St.1915, p. 115, as amended. Section 67 of that act, St.1915, p. 161, as amended by St.1933, p. 1157, provides that no court of the state, other than the Supreme Court, "shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof." The same section provides that the Supreme Court alone shall have power to review the decisions of the Railroad Commission and then only by means of a writ of review. Full force and effect have been given by the courts to these provisions of the Public Utility Act. In Wallace Ranch Water Co. v. Foothill Ditch Co., supra, 5 Cal.2d 103, at page 121, 53 P.2d 929, 938, it is said: "Under such circumstances, the trial court had no jurisdiction directly or indirectly to overrule an order of the Railroad

Commission. The power to reverse, review, correct, or annul orders of that commission rests solely in the Supreme Court (section 67 of the Public Utilities Act, supra), and the superior court is without jurisdiction in the premises. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas. 1915C, 822; Truck Owners, etc., Inc. v. Superior Court, 194 Cal. 146, 228 P. 19; Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249; People v. Hadley, 66 Cal.App. 370, 226 P. 836. It is clear, therefore, that those portions of the findings, conclusions and judgment that purport to fix the rate to be paid by plaintiff to defendant for the service rendered, and that purport to find that the commission was without jurisdiction should be stricken."

It is at once apparent that the judgment in the case of Wallace Ranch Water Co. v. Foothill Ditch Co., supra, which was modified and affirmed by the Supreme Court, could not modify, nullify, or set aside all or any portion of the order of the Railroad Commission. While the judgment was modified and affirmed by the Supreme Court, after modification it was still a judgment of the superior court of Tulare county. It became final and could be enforced by that court. It was not a judgment of the Supreme Court. The superior court could not annul or modify an order of the Railroad Commission. Further, it was not a judgment of the Supreme Court in an original proceeding in certiorari instituted in that court which is the only proceeding in which that court has jurisdiction to annul an order of the Railroad Commission. Such jurisdiction is not possessed by any other court. It follows that the judgment in the case of Wallace Ranch Water Co. v. Foothill Ditch Co., supra, could not annul, modify, or set aside the order of the Railroad Commission of June 18, 1929, which is the basis of the instant action.

The most that can be said of the Tulare county judgment after its modification by the Supreme Court is that it quieted the title of the Wallace Ranch Water Company to its water, to an easement in the ditch and flume, and perhaps gave it the right to flow its own water through the conduits. If we assume, without holding, that the judgment gave it that last-mentioned right, still it is clear that right was never exercised by the Wallace Ranch Water Company. It permitted the Foothill Ditch Company to perform that service for it and to pay all expenses in connection with the operation. If the Wallace Ranch Water Company possessed that legal right it does not follow that the right could be exercised by it without any compensation to the Foothill Ditch Company. The fixing of the amount of such compensation is a matter solely within the jurisdiction of the Railroad Commission, subject to review in appropriate proceedings by the Supreme Court.

While, formerly, there may have been some doubt expressed as to the finality of the findings and orders of the Railroad Commission, it is now settled that, where the Railroad Commission makes findings of fact and an order after hearing in a matter in which it has jurisdiction of both the subject matter and the parties, and where the order becomes final, a trial court cannot make findings contrary to those of the commission or render judgment modifying or nullifying its order. Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436; Blymer v. Sutter Butte Canal Co., 217 Cal. 572, 20 P.2d 320; Wallace Ranch Water Co. v. Foothill Ditch Co., supra. Thus the doctrine of res adjudicata now extends to such orders of the Railroad Commission. If Wallace Ranch Water Company feels aggrieved by the order of the Railroad Commission, and if it believes it has grounds therefor, it can, on a proper showing, ask that body to hold a hearing to review the rates fixed for service to be rendered it by Foothill Ditch Company. That body, and not the courts, has the primary jurisdiction to fix rates to be charged by public utilities.

The arguments of Wallace Ranch Water Company under its second ground of reversal are but another method of attack on the finality of the order of the Railroad Commission. In its final analysis, its arguments in support of its second ground for reversal are but a restatement in a different form of the arguments under its first ground for reversal. What we have already said, and the authorities we have cited, sufficiently dispose of these arguments. We need not repeat them.

[5] Further, the trial court found there was no waiver of any rights under the last order of the Railroad Commission and there is evidence to support that finding. If any waiver of rights under the earlier orders be assumed, such waiver would not be controlling here. Those orders are not the direct foundation of Foothill Ditch

Company's right of recovery. That right was fixed under the last order of June 18, 1929. There is no waiver that can be claimed under that order.

[6] Wallace Ranch Water Company next argues that the order of the Railroad Commission is void on its face for uncertainty in that it does not go into sufficient detail in defining the exact service to be rendered by Foothill Ditch Company in consideration for the compensation to be paid to it. It should be a sufficient reply to this argument to observe that the order is sufficiently definite and certain to have permitted satisfactory performance under it since its rendition on June 18, 1929. Wallace Ranch Water Company admits that it has received its water in due time and in proper quantities. It is not now questioning nor has it questioned due performance. It is complaining of a high charge for performance. Further, the particular decision of the Railroad Commission which Wallace Ranch Water Company challenges here has been upheld by the Supreme Court. See, Wallace Ranch Water Co. v. Ry. Com., S.F. No. 13580, Minutes of Supreme Court, supra. Thus the question has been adjudicated and that adjudication has become final as far as this court is concerned. Wallace Ranch Water Co. v. Ry. Com., 9 Cir., 47 F.2d 8; Southern Pac. Co. v. Van Hoosear, 9 Cir., 72 F.2d 903.

Wallace Ranch Water Company argues its last ground for reversal under two heads. It urges, first, that there was no express or implied promise on its part to pay and no payments were made by it, and, second, that the accounts sued upon were not book accounts and that consequently a considerable portion was barred by the statute of limitations.

[7, 8] Foothill Ditch Company rendered bills each month to Wallace Ranch Water Company showing the water furnished and the charges for such services. The balance unpaid was carried forward each month. Wallace Ranch Water Company accepted and used the water delivered to it. From these facts a promise to pay may be inferred. New York Central R. R. Co. v. Frank H. Buck Co., 2 Cal.2d 384, 41 P.2d 547; Northern Assurance Co. v. Stout, 16 Cal.App. 548, 117 P. 617; section 1589, C.C. A book account may consist of entries on one side only. Bailey v. Hoffman, 99 Cal. App. 347, 278 P. 498.

Wallace Ranch Water Company contends that the accounts kept by the Foothill Ditch Company were not kept in books and therefore are not book accounts. This question presents some uncertainties because of the condition of the record. As we have observed, the pleadings were amended by interlineation at about the close of the trial to allege a book account. The question of the fact of books being kept did not become really important until about that time, which probably accounts for an unsatisfactory state of the record on this one question in a case that was otherwise carefully tried.

The evidence concerning the books kept by Foothill Ditch Company may be summarized as follows: That the measurements and meter readings of water delivered to Wallace Ranch Water Company were taken; that they were turned over to Foothill Ditch Company's engineer who reduced them to second feet; that he reported these computations to the secretary of Foothill Ditch Company who computed the value of the service rendered in delivering the water daily at the rate of 14 cents per second foot; that these computations were then transposed in detail onto sheets; that an original and one carbon copy was made; that the original was sent monthly to Wallace Ranch Water Company and the carbon copy retained in the office of Foothill Ditch Company. One witness testified that these statements were kept in a "folder" and constituted a book account. Another witness testified that these accounts were "assembled" in the company's "office in one place and together as one account." One witness also testified that Foothill Ditch Company kept a "general ledger."

A ledger is defined as follows: "The principal book of accounts of a business establishment, in which all the transactions of each day are entered under appropriate heads so as to show at a glance the debits and credits of each account." Funk & Wagnalls Standard Dictionary.

See, also, First National Bldg. Co. v. Vandenberg, 29 Okl. 583, 119 P. 224. From this it would seem to appear that the evidence that Foothill Ditch Company kept a general ledger indicated the existence of a book account. State v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am.St.Rep. 171, 2 Ann. Cas. 841. However, as we cannot discover that this book was either introduced in evidence or produced in court, we prefer to predicate our decision on this phase of the case on other grounds.

It is rather well settled that a book account cannot consist of numerous loose pages not bound together in some substantial form. To constitute a book the pages must be fastened together with some degree of substantial permanency. Black's Law Dictionary, 3d Ed., "Book", "Book Account"; MacLaren v. Gilbert, 111 Cal.App. 198, 295 P. 349; Ogden Packing & Provision Co. v. Tooele Meat & Storage Co., 41 Utah 92, 124 P. 333; Stieglitz v. O. J. Lewis Mercantile Co., 76 Mo.App. 275.

[9, 10] The manner in which the carbon duplicates of the account were "assembled" together or the character of the "folder" in which they were placed cannot be determined from the record. Under the modern method of accounting where the loose leaf system is in general use by many firms, sheets of accounts are so bound together in a folder or assembled in a cover with such degree of permanence that a book results. These records of the water delivered and the amount charged for delivery, assembled in their folder, were present in court and introduced in evidence. The trial judge saw them and the permanency of their binding. What the judge saw was evidence in the case. Ethel D. Co. v. Ind. Acc. Comm., 219 Cal. 699, 28 P.2d 919. As we cannot determine the character of the binding from the evidence, we must presume that what the trial judge saw supports the findings and judgments. We must conclude he saw them bound in a permanent book. The question of the permanency of these records was one of fact addressed to the trial judge. Egan v. Bishop, 8 Cal.App. 2d 119, 47 P.2d 500. The trial judge having found that the accounts were book accounts and there being evidence to support that finding (the appearance of the books in court), the finding is conclusive on appeal.

The judgments are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

MOSS v. UNDERWRITERS' REPORT, Inc.*

Civ. 10533.

District Court of Appeal, First District, Division 2, California.

March 29, 1938.

Hearing Granted by Supreme Court May 26, 1938.

1. Account, action on ⊂⇒22

A book account must be proved before it will support a judgment.

2. Limitation of actions ⊂⇒13

In action by employee on open book account to recover compensation for services, based on oral contract of employment, where errors in the account were made by employer, and throughout employment, employee was led to believe that employer was keeping correct book account and was perhaps thereby delayed in bringing action on oral contract within time limited therefor, employer should be estopped to take advantage of its own errors and of two-year statute of limitations applicable to actions on oral contracts.

3. Appeal and error ⊂⇒1071(6)

In action by employee on open book account to recover compensation for services, based on oral contract of employment, trial court's failure to find specifically that action was not barred by two-year statute of limitations was not prejudicial to employer, where court's findings indicated that statute had not run.

4. Appeal and error ⊂⇒1071(6)

When it appears from the facts found that the statute of limitations has not run, there is no prejudicial error in a failure to find separately on the alleged bar of the statute.

5. Estoppel ⊂⇒92(1)

In action by employee on open book account to recover compensation, where employer and employee had orally contracted for weekly wage and 3 per cent. of gross income from employer's publications to be paid employee, employee accepted checks which contained notation that a certain part thereof was for salary and balance for bonus and that indorsement of checks evidenced payment in full of items set forth in voucher, but employer continued to enter on its books the balance due employee, employee was not estopped from recovering on book account.

6. Estoppel ⊂⇒54, 58

One who relies on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury.

7. Account, action on ⊂⇒25

In action by employee on open book account to recover compensation, based on oral contract of employment, where errors favorable to employee were committed by employer in making entries in books, law court did not invade equity jurisdiction in granting judgment for amount less than that shown on books, since recovery was on contract, of which book account was merely evidence, and court was not reforming contract.

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*For subsequent opinion see 83 P.2d 503.

8. Appeal and error ⚿1033(1)

An appellant cannot urge reversal on ground of an error which was favorable to the appellant.

9. Costs ⚿146

The determination of what are necessary costs and disbursements and whether the expenditure was made in good faith is within the discretion of the trial court. Code Civ.Proc. § 1033, as amended by St. 1933, p. 1902.

10. Appeal and error ⚿984(1)

An appellate court will not substitute its discretion for that of the trial court, in determining what are necessary costs and disbursements, except upon a showing of a gross abuse of that discretion. Code Civ. Proc. § 1033, as amended by St.1933, p. 1902.

11. Costs ⚿169

In action on open book account, court erred in allowing in the cost bill an item for premiums paid on bonds on attachments. Code Civ.Proc. § 1033, as amended by St. 1933, p. 1902.

12. Appeal and error ⚿984(1)

Where appellant attacked an order allowing certain items in cost bill, but failed to show an abuse of discretion by trial court in making the allowance, the implied finding of trial court that the expenditures were necessary was not disturbed. Code Civ. Proc. § 1033, as amended by St.1933, p. 1902.

13. Costs ⚿234

On appeal from an order allowing certain costs, where order was modified by striking one item, neither party would be awarded costs on such appeal. Code Civ. Proc. § 1033, as amended by St.1933, p. 1902.

◆

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by Reginald G. Moss against the Underwriters' Report, Inc., to recover compensation for extra services. Judgment for plaintiff for $12,422.07, and defendant appeals from the judgment and also from an order allowing certain items of costs.

Judgment affirmed and order modified and affirmed.

William M. Abbott, Cyril Appel, Ivores R. Dains and Henry A. Plattner, all of San Francisco, for appellant.

Augustin C. Keane and Edgar C. Levey, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued upon three separate causes of action for compensation for extra services. The first count, or cause of action, was on an open book account for money claimed to be due up to December 31, 1934; the second was upon an account stated; the third was on an open book account for money claimed to have been earned after December 31, 1934. Prayer was made for $13,543.51. The action was tried without a jury, and plaintiff had judgment on the first and third causes of action in the sum of $12,422.07. The appeal from this judgment is presented on a typewritten transcript to which has been added, after a motion for diminution of the record, a number of the exhibits.

Plaintiff rested his claim upon a contract with the defendant employing him to act as editor of three publications which the defendant was engaged in printing and circulating. The contract of employment began in 1922 and terminated on July 15, 1935. The original agreement called for a weekly salary of $75 and 3 per cent. on the annual gross income from these publications, such percentage to be determined annually after an accounting extending over each calendar year. The parties agree that a 3 per cent. bonus was to be paid, but disagree as to whether it should be based on the income of all three publications, or upon that derived from two only. Books of account were kept by the defendant from which the plaintiff claimed that he was entitled to recover the sum prayed for. At the trial the court found certain errors in these accounts which caused a reduction in the amount allowed in the judgment. As this situation gives rise to the principal attack upon the judgment, it is well to add these details: in his first count the plaintiff relied upon the balance shown to be due on these books of account up to December 31, 1934, which was $14,068.51, and, allowing a credit of $525, asked judgment for $13,543.51. The third count, though pleaded on an open book account, did not fix the amount, because the income for that period was unknown to plaintiff, but asked the court to take an accounting to ascertain the amount due. Defendant's bookkeeper estimated plaintiff's bonus by taking 3 per cent. of the gross income derived from three of defendant's publications, whereas the defendant claims that plaintiff was not entitled to any bonus upon the income from one of them. Other errors were made by the bookkeeper, some favorable and others unfavorable to the plaintiff. From the balance shown on the books as of December 31, 1934, the trial court allowed deductions claimed as errors by the defendant amounting to $2,449.75, and a credit of $700 paid to plaintiff subsequent to December 31, 1934. The sum of $1,503.31 was found due plaintiff upon his third count for services rendered after that date. When this was added to the balance of the principal claim, following the deductions noted, the full sum found to be due was $12,422.07, which is the amount of the judgment.

[1, 2] Growing out of the situation just mentioned, appellant's first question stated on this appeal is: "Is not an essentially erroneous book account insufficient to evade the bar of the statute of limitations?" There is sufficient evidentiary support for the trial court's finding that a contract of employment was executed, as alleged in the complaint, calling for payment of a salary to plaintiff and, in addition thereto, a sum equal to 3 per cent. of the annual gross income from two of the publications printed by the defendant; that the "defendant caused the same (the money due plaintiff for such extra compensation) to be regularly computed by its bookkeeper and accountant," and that such account was "duly entered upon a record kept by said defendant corporation for that purpose"; that, in computing said sum of $14,068.51, "there were by inadvertence and mutual mistake included therein certain sums of money equal to three per cent (3%) of the gross income of defendant corporation from sources other" than the two publications mentioned; and that these sums, amounting to $2,449.75, should be deducted from said account. Upon these facts the appellant contends that the book account must be rejected as a whole, and that the first cause of action is therefore barred because it rests on an oral contract and was not brought within two years. Respondent replies that the book account was kept by appellant in the regular and usual course of its business, that it was proved by uncontradicted evidence that the only errors in the account were made by appellant, and that the respondent was not responsible for them. It cannot be denied that the entries were made in the regular and usual manner, that the account meets all the requirements for an "open book account," and that appellant alone is accountable for the errors. None of the cases cited by the appellant gives any support for the position here taken. They hold generally that a book account must be proved before it will support a judgment. As to this there is no controversy. The point here is, Must it be wholly free from error before it will support a judgment for the amount found due? The cause of action is upon the account, not upon the separate items which enter into it. It is like an action on a written contract, or on a promissory note, neither of which is defeated by the appearance of errors which may be readily corrected. Here the appellant was responsible for the errors upon which it relies to defeat its own account. On principle it should be estopped to take advantage of its own errors when, throughout the period of employment, the respondent was led to believe that appellant was keeping a correct book account, and may have, for that reason, delayed bringing his action within the time limited for an action upon an oral contract.

[3, 4] The failure of the trial court to specifically find that the action was not barred by the two-year statute of limitations was not prejudicial to the appellant. If a finding had been made, it must have been adverse to appellant. Egan v. Bishop, 8 Cal. App.2d 119, 123, 47 P.2d 500; Anderson v. Calaveras Central Mining Corporation, 13 Cal.App.2d 338, 349, 57 P.2d 560. When it thus appears from the facts found that the statute has not run, there is no prejudicial error in a failure to find separately on the alleged bar of the statute. Woodham v. Cline, 130 Cal. 497, 498, 62 P. 822; Scott v. Symons, 191 Cal. 441, 456, 216 P. 604; Webster v. Mountain Monarch G. M. Co., 6 Cal.App.2d 450, 454, 44 P.2d 646; 24 Cal. Jur. p. 944.

It is urged that the original contract was abrogated, or so materially modified, as to defeat all rights of respondent founded upon it. It is appellant's contention that the contract of employment made in 1922 called for a base salary of $75 a week and that the bonus claimed by respondent was to be allowed on that base; that subsequently the base salary was increased, and hence the trial court should have found that the agreement to pay a bonus fell with this change. This all rests upon the conflicting testimony of the respective parties as to what was said, and what arrangements were made, as to compensation at different stages of the period of employment. There is sufficient evidentiary support for the trial court's finding that the appellant agreed to pay the respondent a bonus of 3 per cent. of the gross annual income in addition to all fixed salaries throughout the period of employment, and the conduct of the parties during that period lends additional support to the finding.

[5, 6] The appellant argues that the respondent is estopped from claiming any balance due because of these facts: at various times during the period of employment the respondent was paid by check drawn on the corporation which contained in a space provided thereon a notation of a certain amount for salary and a certain amount for bonus. Each check had printed thereon the words "Endorsement of this check evidences payment in full of items set forth in voucher." Respondent answers that no plea of estoppel was made in the trial court, that the point was first raised on this appeal, and that there is no evidence of estoppel as the appellant did not alter its course of conduct in any respect, but that it continued to enter upon its books of account the balance remaining due. If the question had been raised in the trial court, that court would have necessarily found that there was no estoppel on this evidence. The checks were plainly payments on account of the bonus awards carried on the books which were not definitely ascertained at the time. Throughout the period the endorsements on the checks were treated as receipts for payment "on account" of the bonus awards and in the amounts, or items, stated on the face of the check; the appellant continued to carry entries on its books of the amounts remaining due, notwithstanding these endorsements, and had better means of knowledge than the respondent of the condition of its own books, and of the manner in which these endorsements on the checks were treated. The evidence fails to show the essential elements of an estoppel. One relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury. 10 Cal.Jur. pp. 636, 637; 10 R.C.L. pp. 696, 697; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.2d 263.

[7, 8] Finally the appellant argues that the trial court went beyond the issues raised in the complaint and reached into equity when it reduced the award from the amount shown to be due on the books of account. The point rests on the finding that by "inadvertence and mutual mistake" the sum of over $2,400 was included in the account as due the respondent. The judgment in favor of respondent was reduced to that extent. This, the appellant argues, was a reformation of the contract of employment which the court could order only through its equity jurisdiction. Then, it is argued, that, since the action is one strictly at law, equitable remedies could not be granted. For the purpose of determining the running of the statute of limitations, the cause of action is deemed to be one on the account, and the statute is said to run from the last entry in the account. But the basis of the right of recovery is the contract of employment, and for this purpose the book account is deemed evidence of the contract, but not the contract upon which the right is based. When errors are found in the account, they are errors in the evidence, and not errors in the basic contract. Hence, a reduction in the amount allowed from that shown due in the account is not a reformation of the contract of employment, and it does not bring into play the exercise of any equity jurisdiction. But, if we should accept appellant's theory, we would have to restore to the judgment the amount deducted. Respondent argues that the trial court erred in making the reduction, but concedes that he cannot raise the point because he did not take an appeal. But he is not averse to accepting the advantages of appellant's position. Since the error complained of was favorable, rather than prejudicial, to the appellant, he is in no position to urge a reversal on that ground.

In a separate appeal three classes of items allowed in the cost bill are attacked: premiums paid on bonds on attachments; cost of a copy of a deposition of plaintiff taken by defendant; and cost of depositions of others taken by plaintiff but not used at the trial.

[9, 10] Section 1033 of the Code of Civil Procedure, as amended by St.1933, p. 1902, authorizes the prevailing party to recover "his costs and necessary disbursements in the action." Nowhere in the Code can be

found any definition of "costs" or "necessary disbursements" which could form a guide as to what expenditures should be allowed. Numerous cases have been written holding that it is within the discretion of the trial court to determine what is "necessary" and whether the expenditure was made in good faith. It is also settled that an appellate court will not substitute its discretion for that of the trial court, except upon a showing of a gross abuse of that discretion.

[11] In Williams v. Atchison, Topeka, etc., Ry. Co., 156 Cal. 140, 103 P. 885, 134 Am.St.Rep. 117, 19 Ann.Cas. 1260, the Supreme Court affirmed an order of the trial court striking from a cost bill an item covering a premium paid for a surety bond in an action of claim and delivery. In support of the judgment, the court said that, in giving a bond of a surety company, the plaintiff was exercising a privilege and convenience, not a necessity. That case was followed in Christenson v. Cudahy Packing Co., 84 Cal.App. 237, 257 P. 906, where a similar order was affirmed. In the first case it was suggested that, if the Legislature did not agree with the decision, it would be an easy matter to provide for the allowance of such items. No change has been made in the statute since that decision, and we are constrained to hold on the authority of the Williams Case alone that the item should not be allowed.

[12] The two remaining classes present a different situation. The respondent made a full showing as to the necessity for these expenditures and the aid which the depositions afforded in clarifying the issues and in saving the time of the trial court in the presentation of the evidence. The trial court had all the facts of the conduct of the trial and was in a far better position to determine the necessity of these expenditures. The appellant has not made any showing of an abuse of discretion as to this part of the order, and the implied finding of the trial court that these expenditures were necessary should not be disturbed.

[13] The order is modified by striking therefrom the sum of $40 expended for premiums on surety bonds, and in other respects the order is affirmed. Neither party will have costs on the appeal from the order. The judgment is affirmed, the respondent to have his costs on that appeal.

We concur: STURTEVANT, J.; SPENCE, J.

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25 Cal.App.2d 642

VENTURA COUNTY TITLE CO. v. CONSTANCE.

Civ. 5995.

District Court of Appeal, Third District, California.

April 7, 1938.

1. **Mortgages** ⚿608½

In creditor's action to quiet title to realty covered by deed purporting to be absolute but constituting security for payment of debtor's obligation, debtor was entitled to a statement of receipts and disbursements made upon his account.

2. **Appeal and error** ⚿1054(1)

In creditor's action to quiet title to realty covered by deed purporting to be absolute but constituting security for payment of debtor's obligation, if statement of receipts and disbursements made upon debtor's account was true and correct statement, debtor could not complain because statement was prepared by stranger to transaction.

3. **Mortgages** ⚿608½

A creditor's action to quiet title to realty covered by deed purporting to be absolute but constituting security for debtor's obligation was equitable in nature, and rules of equity applied thereto.

4. **Equity** ⚿66

In creditor's action to quiet title to realty covered by deed purporting to be absolute but constituting security for payment of debtor's obligation, until debtor showed that he was himself prepared to do equity he was not in a position to ask that he receive the benefit of equitable principles.

5. **Appeal and error** ⚿1073(1)

In creditor's action to quiet title to realty covered by deed purporting to be absolute but constituting security for debtor's obligation, record did not disclose that debtor was wronged by decree quieting title in creditor unless debtor paid amount found to be due.

◆

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by the Ventura County Title Company against Sabbas Constance to quiet title to property, wherein the defendant filed a cross-complaint alleging title in him and seeking damages for alleged destruction of property and loss of rents. From an adverse judgment, defendant appeals.

Affirmed.

Stanley T. Tomlinson, of Santa Barbara, for appellant.

Rogers & Rogers and Merle J. Rogers, all of Ventura, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1912, Constance, the defendant and appellant herein, as vendee, entered into a contract with one Catherine Flint, as vendor, to purchase certain real property in the city of Ventura.

In 1924, Constance, being in default on the contract, the vendor commenced an action to quiet title to the property. Subsequent to the filing of the action and before judgment, Constance negotiated a loan with the Ventura County Title Company to pay the Flint claim. The Title Company advanced some $2,600 for this purpose, which was obtained from Charles Bernard. In consideration of this loan Constance joined with Catherine Flint and executed and delivered a deed of the property to the Title Company, and at the same time he entered into an agreement which provided that upon the payment by him of the purchase price in installments of not less than $75 a month with interest on the unpaid balance, at the rate of 12 per cent. per annum, the Title Company would reconvey the property to Constance.

Payments were made under this agreement from time to time, but with considerable irregularity, and after several years, during which time various street assessments and taxes had been paid by Bernard or the Title Company, an action was brought by the Title Company against Constance to quiet their title to the property.

To this complaint the defendant answered, denying in general the allegations of the complaint and set up a cross-complaint alleging title in himself and an action for damages for the alleged destruction of property and loss of rents. The cause eventually came on for trial, wherein the court found against defendant in regard to his claim for damages, and found that the property had been removed with his knowledge and that no damage had been sustained thereby in any amount. The court further found that the deed in controversy, although absolute in form, was intended as security for the payment of the obligation of the defendant under the agreement of sale, and that plaintiff had been, since 1924, in the lawful possession of the property in question and has been vested with legal title thereto, subject only to the right of defendant to a transfer of the title and possession to him upon the payment by the defendant to plaintiff of $6,544.48, on or before January 2, 1936.

In accordance with these findings, and the conclusions of law based thereon, an interlocutory decree was made providing that in the event defendant paid to plaintiff the sum found due by the court, a final decree would be entered quieting title in defendant, but if not paid the final decree would quiet title in the plaintiff.

This appeal is presented upon a bill of exceptions, and we have before us only portions of the record, but the real point at issue seems to be the sufficiency of the accounting submitted by plaintiff. It appears, however, that application for the money to discharge the claim of Mrs. Flint was made in the first instance by appellant to Mr. Bernard. Bernard refused to make the loan, and appellant applied to the Ventura County Title Company as hereinbefore set out. A few payments were made to the Title Company by appellant, but apparently some misunderstanding arose, and thereafter payments were made to Mr. Bernard by appellant. From the exhibits in the bill of exceptions in the form of letters written between the parties, there can be no doubt that Mr. Constance knew that some relationship existed between Bernard and the Title Company, and that it was in reality the money of Bernard he had received through the Title Company. For instance on March 2, 1925, a letter from the Title Company addressed to Mr. Constance acknowledged receipt of the sum of $100, which had been sent by Constance to Mr. Bernard to be credited upon the note. In a letter of March 7, 1926, the Title Company wrote to Constance that they had examined the statement rendered by Bernard to him in January, which it found to be correct. In September, 1926, Bernard wrote to Constance that, complying with the request made by Constance, he was reducing the rate of interest on the note to nine per cent. On several later occasions Bernard wrote to Constance demanding payment of his note and frequently stated to him that he wanted his money, and not the property itself. In the letters written by Constance to Bernard we find Constance frequently asking for itemized statements of his payments and for further time to pay the balance. This correspondence extended over a period of several years and although it was claimed by Constance that he made all of his checks payable to the Title Company, he did not produce the canceled checks, and the court found that the payments were made to Bernard and not to the corporation.

The objection is made by appellant that the court improperly overruled the objection of appellant to the accounting submitted by Bernard. It was and is the contention of appellant that the action was between the Ventura Title Company and himself, and that Bernard was a stranger to the transaction and was not in a position to render an accounting of the condition of the books of the Title Company with reference to the affairs of Constance.

It is true Bernard prepared the statement of account from his own books and not from the books of the Title Company, and that he was not an officer of the Title Company, but aside from the formal objection made to the admission of this accounting, no evidence was offered to show that the accounting was not a full, true and correct statement of the condition existing between Constance and the Title Company or between Constance and Bernard. It is apparent that all the advances were made by Bernard to pay the taxes and assessments levied against the property, and these payments were paid to the account and for the benefit of appellant. In fact, practically all of the items appeared in the accounting evidenced by the letters from Constance to Bernard, and offered in evidence by Constance.

The record also disclosed that appellant had failed to comply with the terms of the agreement which he himself pleaded in his cross-complaint, and that he paid nothing after July, 1928, the complaint in this matter having been filed in December, 1931.

[1, 2] Constance was entitled to a statement of the receipts and disbursements made upon his account, and this he apparently received. This statement has not been questioned by the plaintiff in this action, it having adopted the same, and if it is a true and correct statement, and nothing appears in the evidence to the contrary appellant cannot complain as to who actually prepared the same.

[3, 4] This action being equitable in its nature, the rules of equity apply, and until appellant showed that he was himself prepared to do equity he was not in a position to ask that he receive the benefit of those principles.

[5] We do not find that appellant has been wronged in any way, either by the decree as entered by the court or by the approval of the accounting which the court found to be true and correct.

The judgment, therefore, should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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25 Cal.App.2d 649

MITROVITCH v. GRAVES.

Civ. 5947.

District Court of Appeal, Third District, California.

April 8, 1938.

1. Automobiles 🔑244(6)

Evidence that motorist failed to stop after striking pedestrian, but that soon after he removed broken headlamp from automobile, warranted jury's implied finding that motorist knew that he had struck pedestrian and was attempting to conceal his participation in accident.

2. Automobiles 🔑244(36)

Evidence respecting visibility, conditions of street, and motorist's attempted concealment of participation in accident authorized jury's implied finding that injury sustained by pedestrian who was struck while crossing street at middle of block was result of motorist's negligence. St.1935, p. 188, § 562.

3. Automobiles 🔑245(72)

In action for injuries sustained by pedestrian when struck by automobile while crossing street in middle of block, whether pedestrian was contributorily negligent in standing by parked truck while waiting for automobile to pass was for the jury. St. 1935, p. 188, § 562.

4. Appeal and error ⚷1001(1)

The jury's implied finding that pedestrian was not contributorily negligent, with respect to injuries sustained when struck by automobile in middle of block, by failing to anticipate that motorist would fail to see him as he stood in plain view was conclusive, where there was substantial evidence to support such finding, though reasonable minds might differ. St.1935, p. 188, § 562.

5. Automobiles ⚷217(3)

A pedestrian who attempted to cross well-lighted street over which no automobiles had passed for some minutes was not contributorily negligent merely because he attempted to cross at other than the regular pedestrians' pathway. St.1935, p. 188, § 562.

6. Automobiles ⚷217(3)

Whether pedestrian was contributorily negligent in attempting to cross street at other than the regular pedestrian's pathway was to be determined by a consideration of the amount of traffic and all other surrounding circumstances. St.1935, p. 188, § 562.

7. Automobiles ⚷217(6)

The statutory requirement that a pedestrian crossing a street at a point other than a regular marked crosswalk "yield the right of way" to all vehicles does not mean that a pedestrian ventures upon a public highway or street at his peril, or that he must flee at sight of an approaching vehicle, but merely requires that pedestrian stop and permit a vehicle to pass ahead of him, if crossing is attempted under circumstances which render a collision likely. St.1935, p. 188, § 562.

8. Automobiles ⚷245(72)

A pedestrian who had stopped to permit two automobiles to pass before attempting to cross street at other than regular marked crosswalk, but who was struck by the second of the automobiles as it swerved from its course, was not contributorily negligent as a matter of law for alleged failure to "yield the right of way," as required by statute. St.1935, p. 188, § 562.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Robert Mitrovitch, by his guardian ad litem, Vivian Mitrovitch, against Albert Graves, for injuries sustained when struck by an automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

Yale S. Kroloff, of Oakland, Rich, Weis & Carlin, of Marysville, and Richard H. Fuidge, of San Francisco, for appellant.

Ray Manwell and Ivan C. Sperbeck, both of Marysville, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

A judgment for $600 was rendered against the defendant in accordance with the verdict of a jury which was returned in a suit for damages for personal injuries sustained by the plaintiff as a result of having been struck by an automobile while he was walking across a street in Marysville.

The appellant contends that the verdict and judgment are not supported by the evidence for the reason that it appears, as a matter of law, the plaintiff was guilty of contributory negligence in violating the provisions of section 562 of the Vehicle Code, St.1935, p. 188, by failing to "yield the right of way" to the automobile, while he was walking across Fifth street at a place other than the regular pedestrians' pathway.

The accident occurred midway in a block on Fifth street in Marysville at 8 o'clock on the evening of November 4, 1936. It was dark, but the street was well lighted in that vicinity. The street lamps were burning, and the lights from a Texaco service station near by illuminated the highway at that point so that an object could be plainly seen at a considerable distance. Fifth street extends east and west. It is paved and fifty-six feet in width between the curb lines. Along the center of Fifth street there are double tracks of the Sacramento Northern Electric Railroad. These tracks occupy a space of about sixteen feet in width, leaving twenty feet of the street unobstructed on either side thereof. We assume the rails are flush with the surface of the street and that they do not obstruct free use of the street throughout its entire width, when trains are not passing. I street intersects Fifth street at right angles on the easterly side of the block in which the accident occurred. J street intersects Fifth street at right angles one block west from I street. The Texaco service station occupies about fifty feet of space at the northwest corner of I and Fifth streets. Directly across Fifth street, at the southwest corner of I and Fifth streets there is a space occupied by used cars.

The plaintiff, at the time of the accident, was a high school student, seventeen years of age. At 8 o'clock on the evening of November 4, 1936, accompanied by his friend, Jack Dunn, the plaintiff drove his automobile west along Fifth street. When he reached I street he drove across to the southerly side of Fifth street and stopped in front of the used car premises, where he met and entered into conversation with Mr. Fenton, the proprietor of that place, who was an acquaintance of the plaintiff. As they stood on the sidewalk conversing, George Myers, another friend of plaintiff, drove his truck northerly up I street, turned to his left and parked near the curb line on the northerly side of Fifth street in front of the Texaco service station. Observing the plaintiff on the opposite side of Fifth street, Myers hailed. He remained seated in the cab of his truck. There were then no other machines in sight on Fifth street, except one car which was parked on the northerly side at a considerable distance ahead of the truck. The plaintiff immediately crossed Fifth street and stood with his right foot on the left running board of the truck, while he talked for a few moments with his friend Myers. Having completed their conversation, the plaintiff turned, looking to his right whence approaching cars might be expected, intending to recross Fifth street, to the place where he had left his machine. Until that time, no automobiles had passed either up or down Fifth street. No moving cars were then in sight. There was apparently no traffic at that time. The plaintiff said: "'I had a foot on the running board and turned like this (to his right) and took about two steps and I stopped when I saw two cars coming towards me. I looked towards * * * Marysville. That would be my right side as I looked. I looked east. I saw two cars coming towards me. One was a black coupe, the one closest to me. The one that was furtherest was a sedan. When I first saw those two cars they were in the intersection at I Street. * * * The coupe which was in front, was closer to the north line of the north track. * * * When I observed the automobile coming I stopped. The automobile came closer and as the coupe passed me I turned to watch it go down the street to see if any cars were coming in the other direction before I walked across and I turned back to see where the sedan was and then I was struck and I didn't quite get to see the sedan. I was just turning from looking in this (southerly) direction about straight across the street when I was struck. I was standing still when I was struck."

This evidence is not contradicted. No other witness testified to the striking of the plaintiff by the automobile. The other witnesses did not see the automobile strike the plaintiff. Mr. Myers, the truckman, said that he parked his truck within a foot of the north curb of Fifth street, where it remained until he finished talking with the plaintiff, and that the moment the conversation was completed and the plaintiff turned away, he started his machine and drove only about fifteen feet when he heard the crash caused by defendant's machine striking the plaintiff a blow that hurled him several feet to the railroad track where his body was found. He was unconscious and very badly injured. Immediately after the crash Mr. Myers saw the two automobiles which passed his truck, the latter of which he recognized as the sedan belonging to the defendant. He said: "I saw a car swerve down the street. I saw an automobile after I heard the crash. I saw two automobiles. I saw one of them swing across the street and almost hit the gutter [on the south side] and saw the other one up to the next corner * * * the corner of Fifth and J Streets. Both cars were heading towards Yuba City. The coupe was ahead of the sedan. The sedan was passing the coupe at the corner of J Street. The sedan passed the coupe at the corner of Fifth and J Streets."

Mr. Myers promptly stopped his truck and went to the assistance of the plaintiff. At the same time Dunn and Fenton, who still stood across the street, hearing the crash, and seeing the plaintiff lying near the northerly rail of the track, also rushed across to aid him.

In spite of the crash which attracted the attention of everyone in the immediate vicinity and in spite of the collision which was forceful enough to hurl the plaintiff a considerable distance and to seriously injure him, and to break the headlamp of his machine and cause the car to swerve nearly to the opposite side of the street, the defendant failed to stop, but, on the contrary, increased his speed, passing the coupé as it reached the next corner. The defendant claims that he did not realize he had hit a person, or that the headlamp was broken, until after he had gone to bed that night, at his wife's request he went out to the garage to place a blanket over the hood of his machine. When he discovered the broken lamp he immediately removed it and carried it into the house.

[1, 2] It was so light at the point where the accident occurred that the group of men who stood on the opposite side of the street plainly saw and recognized Mr. Myers as he sat in the cab of his truck. Yet the defendant claims he did not see the plaintiff as he stood in the street a few feet from the truck of Mr. Myers, and he denies that he knew he had struck a person at all. The implied finding of the jury that the defendant was guilty of negligence which proximately caused the injuries to plaintiff infers that they believed the defendant knew he had struck and injured the plaintiff. The fact that he failed to stop, that he hastened away, and that he immediately removed the broken headlamp from his automobile, furnish circumstances from which the jury was warranted in assuming he knew of the accident and was attempting to conceal his participation in the casualty. At least there is ample evidence to support the implied finding of the jury that the accident occurred through the negligence of the defendant.

[3, 4] The question as to whether the plaintiff was guilty of contributory negligence by standing in the street near the parked truck waiting for the two automobiles to pass, was a problem for the determination of the jury under the circumstances of this case. In effect, the jury decided that a reasonably prudent man would not have been expected to anticipate that the drivers of the approaching cars would fail to see a pedestrian standing in the street in plain view, as the plaintiff was, or that either of them would swerve from their course and strike him down. Even though reasonable minds may differ regarding that conclusion, it is controlling in this case, since there is substantial evidence to support it.

[5, 6] It may not be said under the circumstances of this case the plaintiff was guilty of contributory negligence merely because he attempted to walk across Fifth street elsewhere than along the regular pedestrians' pathway. In determining that question the lack of traffic and all the other surrounding circumstances must be taken into consideration. To attempt to walk across a busy city thoroughfare amid congested traffic might be foolhardy, while it may be perfectly safe to cross a quiet street of a country town where there is little active traffic. In the present case there was a well-lighted open street fifty-six feet in width upon which not a moving automobile had been seen for many minutes. Not a vehicle had passed along Fifth street in either direction during the time the conversations were carried on with Fenton on one side of the street and with Myers on the other side. In passing the parked truck and the plaintiff as he stood in plain view a few feet therefrom, the approaching coupé and sedan had a monopoly of the balance of the street which was not occupied. The railroad tracks did not obstruct their course. Assuming that the truck extended into the street ten feet from the curb line and that the plaintiff stood eight feet beyond the truck, the approaching cars would still have ten feet of clear space before reaching the center of the street. The plaintiff should have been seen as he stood in clear view in the open street. The evidence shows that it was so light where the accident occurred that Fenton and Dunn recognized the features of Mr. Myers as he sat in the cab of his truck across the street. The evidence indicates that the plaintiff did "yield the right of way" to the approaching machines. When he left the truck he turned and looked toward the east. He saw two automobiles coming. He stopped and remained stationary, watching them approach and waiting for them to pass.

[7, 8] The appellant contends that the plaintiff was guilty of contributory negligence for failing to "yield the right of way" for the approaching automobiles as required by section 562 of the Vehicle Code, St.1935, p. 188. That section provides:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

The phrase employed in the statute which requires a pedestrian crossing a street or roadway at a point other than the regular marked crosswalk, to "yield the right of way to all vehicles" does not mean that a pedestrian ventures upon a public highway or street at his peril, or that he must flee at sight of an approaching vehicle. The phrase merely means that when the course of an automobile along a highway meets with that of a person who seeks to walk across the street or roadway at a point other than along a marked crosswalk, under circumstances which render a collision likely, the pedestrian must stop and permit the vehicle to pass ahead of him. Yielding the right of way, within the meaning of the statute, merely means that the pedestrian shall defer to the driver of the vehicle and wait to permit the machine to pass ahead of him. That section is not intended to grant to vehicles a monopoly of streets or highways to the exclusion of pedestrians. The rule applies only under circumstances when the opposite courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay. Under such circumstances the pedestrian must stop to permit the vehicle to precede him. That is exactly what the plaintiff did on that occasion. He stopped and remained stationary to permit the two machines to pass. He actually yielded the right of way to the approaching machines. The foremost machine successfully passed him without difficulty. While he turned to see that the way was otherwise clear for him to proceed across the street after the machines had passed, the sedan which followed the coupé evidently swerved from its course and struck the plaintiff. The question to be determined in this case is, Should a reasonable person have anticipated that the driver of the second car might fail to see him or that he would suddenly change his course so as to strike the plaintiff? The verdict of the jury must be deemed to have determined that question adversely to the defendant. We may not hold as a matter of law that the plaintiff was guilty of contributory negligence for failing to "yield the right of way" or otherwise, under the circumstances of this case.

The case of Chase v. Thomas, 7 Cal. App.2d 440, 46 P.2d 200, 201, upon which the appellant chiefly relies, is not in conflict with what has been previously said in regard to the subject of contributory negligence for failure to yield the right of way. The facts of the Chase Case are vitally different from those of the present action. In that case the plaintiff did not yield the right of way. He failed to stop for an approaching machine to pass ahead of him. He deliberately continued on his way and stepped into the very pathway of the machine, without warning. The driver was powerless to stop and avoid the collision. In the present case the plaintiff did stop and yield the right of way to permit the approaching machines to pass ahead of him. He fulfilled the requirements of section 562 of the Vehicle Code. The first machine successfully passed him. The defendant's automobile, evidently running so closely behind the coupé that he failed to see the pedestrian standing in the street, suddenly and unexpectedly changed his course so as to strike the plaintiff. The jury may have assumed his subsequent conduct indicated that he was convinced his negligence had led to serious injuries and possibly the death of a pedestrian.

The distinction between the facts of the Chase Case and the present one is clearly expressed in that opinion as follows: "Plaintiff had no right to assume that drivers of such vehicles would slow down in order to give way to him. He was under the positive duty, under the provisions of the statute, to yield the right of way to others. He violated this statutory provision. Instead of allowing the automobile to pass in front of him, he stepped directly in front of it. The driver of the car was afforded no opportunity to stop after plaintiff stepped into the way."

We are persuaded there is substantial evidence in this case to support the implied finding of the jury that the plaintiff yielded the right of way to the approaching automobiles, and that he is not, as a matter of law, guilty of contributory negligence.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

25 Cal.App.2d 657

In re GREENWALD'S ESTATE.

FIRST NAT. BANK IN SANTA ANA v. GREENWALD et al.

Civ. 2147.

District Court of Appeal, Fourth District, California.

April 8, 1938.

1. Wills ⚷806

Where will gave more to testator's friends than to his relatives, stated that testator had intentionally omitted to make further provision for heirs, referred to legatees' "shares" in the estate, provided that relatives and friends should be treated alike with respect to estate and inheritance taxes, provided for proportionate distribution of shares as executor should liquidate assets by sale, and provided that if any provision should be unenforceable remainder of will should be carried into effect, and assets were insufficient to pay all legacies, pro rata distribution among all legatees irrespective of whether they were kindred of testator was authorized.

2. Wills ⚷466

Where will provided that "any share given to" devisee who should contest the will should be revoked, use of the word "share" was some indication that legacies were to be considered shares in the estate.

[Ed. Note.—For other definitions of "Share," see Words & Phrases.]

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding in the matter of the estate of Norman R. Greenwald, deceased. The First National Bank in Santa Ana, as executor, filed a petition for instructions concerning distribution of the estate, to which Harold H. Greenwald and others filed answer seeking preference in distribution. From a decree instructing the executor, Harold H. Greenwald and other legatees related to the testator appeal.

Affirmed.

Rutan, Mize & Kroese and Robert C. Mize, all of Santa Ana (Harold H. Coyle, of Placentia, of counsel), for appellants.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, L. A. West, of Santa Ana, and Owen C. Emery, of Glendale (Adrian Marks, of Santa Ana, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree instructing the executor that, in the event the estate is not sufficient to pay all legacies in full, any amounts available for distribution should be distributed pro rata among the legatees without regard to whether they were kindred of the testator or not.

Norman R. Greenwald died on December 11, 1930. In his will, dated December 3, 1930, he left money legacies aggregating $245,000, of which $70,000 was bequeathed to ten of his kindred in varying amounts, and a total of $175,000 to thirteen persons who were not related to him. Any residue was given to a religious corporation. In March, 1937, a petition was filed by the executor, pursuant to section 588 of the Probate Code, as amended by St.1935, p. 1973, alleging that the amount of the estate is insufficient to pay all of the bequests in full, setting forth certain provisions of the will relative to dividing the proceeds of any sale of property proportionately between the beneficiaries named in the will other than the residuary legatee and relative to having the remaining property of the estate appraised and distributing undivided interests therein, alleging that a dispute had arisen between the legatees named in the will who are relatives of the decedent and those legatees who are not such relatives as to whether or not the will discloses an intention that all legatees should share in losses occasioned by the insufficiency of the estate to pay all bequests in full, and praying that it be instructed as to the meaning of the will in these respects. An answer was filed by those legatees who were relatives of the decedent, in which they set up the claim that they were entitled to a preference and that in the event the estate is insufficient to pay all legacies in full they are each entitled to payment in full before anything is paid to legatees who are not related to the testator. The court found that the net value of the estate would probably not exceed $125,000 and that the will expresses an intention that legacies to kindred and legacies to persons not related to the testator shall be paid pro rata in the event the estate is not sufficient to pay all in full. A corresponding decree was entered from which the legatees who are related to the testator have taken this appeal.

The appellants argue that the law of this state, as it existed in December, 1930, gave a preference to kindred over strangers in the payment of legacies when the estate was insufficient to pay all legacies in full unless a different intention was expressed in the will, and that this testator failed to express a different intention. Incidentally it is argued that the adoption of the Probate Code in 1931 made no change in the law in this respect, although it is conceded that the law in force when the testator died is controlling here.

As pointed out in Estate of Wever, 12 Cal.App.2d 237, 55 P.2d 279, a radical change in the statutes which are material here was brought about by the adoption of sections 750, 751, and 752 of the Probate Code. The corresponding previous sections of the Civil Code were interpreted in Estate of Apple, 66 Cal. 432, 6 P. 7, as giving no such preference to relatives in the payment of legacies, where an abatement was necessary, unless an intention to that effect appeared in the will. Whether or not the portion of the opinion in that case which sets forth that interpretation of these statutes should be classed as obiter dictum, as contended by appellants, the reasoning there used is, to say the least, extremely suggestive as to what should be held to be the law under the former statutes.

[1] However, it is unnecessary to give further consideration to this question since we think that the trial court was justified in finding, as it did, that this will sufficiently discloses an intention that legacies to kindred and legacies to persons not related to the testator should be treated alike, with no preference in favor of the kindred, in the event the estate should not be sufficient to pay all these general legacies in full.

The will, after providing for the legacies which have been referred to, and with two omissions which are noted but which are not material here, reads as follows:

"XIX. I furthermore direct that none of the beneficiaries above named shall demand the distribution to them of any bequest to which they would be entitled for five years after my death. My Executor shall not be required to sell any portion of my estate within five years of my death unless my Executor, in his uncontrolled discretion, should believe it to be for the best interests of my estate to make such a sale. In the event of the sale of any property by my Executor the proceeds of such sale shall be divided proportionately between the beneficiaries above named, exclusive of the residuary legatee, until such time as such beneficiaries have received their full bequests.

"I furthermore provide that my Executor shall have the power to sell any of my property at public or private sale and without order or notice of sale but to be confirmed by the court. * * *

"If, upon the expiration of five years from my death, my Executor has not sold sufficient property to pay the bequests herein provided for, exclusive of the residuary bequests, my Executor shall have the option and sole discretion of completing the bequests in conformity with the following plan instead of paying such bequests in cash, that is to say, the Executor may appraise or have the property of the estate appraised by three persons, * * *

"After such appraisement the Executor may allot undivided interests in and to such property, there being as many undivided interests as there are thousands of dollars of appraised value, plus as many thousands of dollars as have been paid to the beneficiaries herein named. The Executor may then complete the payment of the bequests by distributing to each of the beneficiaries as many undivided interests, or fractions thereof, as remain unpaid in thousands of dollars, or fractions thereof, on each bequest, distributing to the residuary legatee the remaining undivided interests. Should my Executor elect to complete the distribution of my estate in the manner provided for in this subdivision instead of through a sale of the property, he shall have one year's additional time in which to do so, and during such year he shall not be personally responsible for interest, nor shall any beneficiary have the right to demand his or her bequest, or any portion thereof.

"XX. I have, except as otherwise in this Will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my demise.

"XXI. If any devisee, legatee or beneficiary hereunder contest this Will, or any part or provision thereof, any share given to such devisee, legatee or beneficiary is hereby revoked and shall become void.

"XXII. I direct that every gift, devise, bequest and interest given under this Will, or any codicil thereto, shall be delivered free from all estate and inheritance taxes, and that such taxes be paid, first, out of any property undisposed of by this Will; or, second, out of the residue of my estate.

"XXIII. In the event that any provision or provisions of this Will are or are adjudged to be for any reason unenforceable, I direct, that, disregarding such provisions, the remainder hereof shall subsist and be carried into effect."

[2] The testator gave two and one-half times as much to his friends as to his relatives. With respect to both relatives and friends he provided that the bequests should not fail but should go to the legatee's spouse in the event of the legatee's prior death. In paragraph XX he states that he has intentionally omitted to make any provision for his heirs other than that specifically mentioned in the will. This is some indication that he did not intend to give them any preference which might otherwise arise from law. In paragraph XXI he refers to a share given to any legatee or beneficiary who should contest the will. The use of the word "share" in this connection is some indication, slight though it may be, that the various legacies were to be considered, as to their respective amounts, as shares in the estate. In paragraph XXII, relating to estate and inheritance taxes, he provided that both relatives and friends should be treated alike. In paragraph XIX he gave the executor a general power to sell any property of the estate and provided that none of the legatees should have the right to compel such a sale within five years after his death, although the executor might in his discretion sell any or all of the estate during that time. It is provided, however, that if and when any of the property is sold the proceeds shall be divided proportionately between all of the legatees, exclusive of the residuary legatee, until such time as they have all been paid in full. It may first be observed that the latter provision would be largely unnecessary if the assets were sufficient to pay all legacies in full since on partial distribution the law provides that such distribution shall be ratable. The executor had the power to sell all of the property and if he disposed of it all in successive sales he was directed to distribute the proceeds among all of the legatees until they were paid in full, and this part of the will could not be carried out unless it was the intention of the testator to have such proceeds distributed proportionately as they came in, without regard to whether or not there eventually proved to be enough to pay all of the legacies in full. The fact that the residuary legatee was particularly excluded from sharing in such distribution until all legacies had been paid in full is a further indication that the testator contemplated that the residuary legatee might not receive anything. In the meantime all the legatees were to be treated alike. Having given the executor the power to sell all of the property, at his discretion, and not knowing how much would be sold at any particular time or what the same would bring, it is inconceivable that the testator intended that payments from the proceeds should be made proportionately to all legatees and that subsequently those not related to him should be required to pay these amounts back in order that they should again be distributed among those legatees who were related to him.

The will was executed in 1930, after the great depression had started and when as a matter of common knowledge values were going down, and the rather elaborate provisions giving the executor power to sell the property of the estate, that he should not be required to sell for at least five years and that he might, after the expiration of five years, distribute interests in the estate in lieu of paying the bequests in cash, rather strongly indicate that the testator had in mind the general economic condition and that he contemplated that the estate might not be sufficient to pay all legacies in full. While the provisions for the optional appraisement of what remained of the estate after the expiration of five years and the allotting of undivided interests in such remaining property, contained in the latter part of paragraph XIX, are rather vague and not entirely satisfactory, it does clearly appear that any such allotment is to be made proportionately among all of the legatees without respect to their relationship to the testator and that any distribution to the legatees is to be made in proportion to the amount of their legacies.

We think the final provision of the will, contained in paragraph XXIII, further indicates an intention that neither any existing fact nor rule of law should interfere more than necessary with the bequests actually made, and strongly confirms the prior indications contained in the will that the testator intended to treat all general legatees alike. It is therein provided that in the event any of the provisions of the will are, or are adjudged to be, unenforceable, for any reason, the remainder shall be carried into effect. The main provisions of the will are those providing for the various legacies, both to kindred and friends. In effect the testator directed that if for any reason these provisions could not be carried out in their entirety they should be carried out in so far as possible. The only reason they cannot be carried out in full is because of a factual condition, the insufficiency of assets, but they can be carried out to the extent that funds are available.

In our opinion, it sufficiently appears from the language of the will that the testator intended that all these legatees, without regard to kinship, should share proportionately in any assets available for distribution, and the court was justified in making the finding complained of. In view of the conclusion we have reached on the main question involved it is unnecessary to consider a further point raised by the appellants.

The decree appealed from is affirmed.

I concur: JENNINGS, J.

MARKS, J., being disqualified, takes no part in the decision of this case.

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25 Cal.App.2d 646

CHANDLER v. QUINLAN et al.

Civ. 5899.

District Court of Appeal, Third District, California.

April 7, 1938.

Hearing Denied by Supreme Court June 2, 1938.

Automobiles 🔑181(1)

Where an automobile driver approached an "S" curve plainly visible for 500 yards at 50 to 60 miles per hour without slackening speed, notwithstanding the warning of two occupants and a highway sign, jury was justified in finding driver guilty of "willful misconduct," in that he knowingly took an unnecessary chance, rendering driver and owner liable for injuries to guest when the automobile skidded out of control and went into the ditch.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Mary Chandler against Thomas Quinlan and another for injuries sustained while riding as a guest in an automobile. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. K. Landram and L. A. MacNicol, both of Merced, for appellants.

C. Ray Robinson, of Merced, N. S. Menifee, of Redwood City, G. P. Maushart, of Los Banos, and James D. Garibaldi and Willard B. Treadwell, both of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment awarding damages for personal injuries sustained by plaintiff, a guest riding with defendants. The automobile in question was owned by Selleck, and at the time of the accident was being driven by Quinlan, with the consent and permission of the owner. There seems to be little dispute as to the facts of the case, which substantially are as follows:

Mrs. Chandler, the plaintiff, together with Miss Berryman, Selleck, and Quinlan left Redwood City on a pleasure trip to go to Toll House in Fresno county, approximately two hundred miles from Redwood City. They stopped at Los Banos for lunch, and upon leaving Los Banos Mr. Quinlan took the wheel, Mr. Selleck riding in the front seat with him, and Miss Berryman and Mrs. Chandler occupied the rumble seat.

Upon leaving Los Banos Quinlan drove at about 45 miles an hour, increasing the speed gradually until they had attained a speed of approximately 55 to 60 miles an hour. Some few miles out of Los Banos they approached an "S" curve. As they were approaching the turn both plaintiff Mrs. Chandler and Selleck told Quinlan to slow down on account of the approaching curve. To one of these warnings Quinlan stated: "Oh, I guess I can make it." Quinlan, the driver, was warned a second time by Selleck, who said, "Slow down, Tommy, there is a bad curve ahead of us," and to this Quinlan again replied that he thought he could make it. The car was proceeding at a too rapid speed to negotiate the turn, as the result of which it skidded onto the gravel shoulder of the highway, causing the car to get out of control, going into a ditch, striking a fence, and causing the injuries to plaintiff here complained of.

The weather was clear and the highway approaching the curve was straight, and not only was the curve known to the driver, but some 300 feet before entering the curve there was a state highway sign upon the road indicating an "S" curve.

Upon these facts the question here for determination is whether the jury were justified in finding Quinlan guilty of willful misconduct. The reviewing courts of this state have had this question before them on many occasions, and it is not necessary here that we review all of these many cases or attempt to redefine what is meant by willful misconduct.

Respondents cite and rely largely upon the recent case of Parsons v. Fuller, 8 Cal. 2d 463, 66 P.2d 430, 432, wherein the Supreme Court reviewed many of the recent cases dealing with willful misconduct, and quoted from Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, as follows: "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom."

In the case of Parsons v. Fuller, supra, the court also said: "We believe that the court properly emphasizes knowledge or appreciation 'that danger is likely to result.' To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct."

Here the evidence discloses that defendant Quinlan, when about 500 yards distant, could plainly see the curve he was approaching and continued at the rate of from 50 to 60 miles an hour into the curve, and was warned not only by two of his passengers but by the state highway insignia of an "S" curve. Under these circumstances it would seem that one indulging in such conduct, had some knowledge that danger was likely to result therefrom, and was knowingly flirting with danger without necessity compelling him taking a chance, and was guilty of willful misconduct.

In Jones v. Hathway, Cal.App., 70 P.2d 681, 683, the driver was proceeding from 55 to 60 miles an hour up to an "S" curve in an underpass. Judgment was rendered in favor of plaintiff, a guest, and upon considering the verdict the court said: "As far as substantial evidence in support of the judgment is concerned, it would seem at least questionable if nothing more appeared than the fact that, over the protest of plaintiff, defendant drove the automobile at night at the rate of 55 to 60 miles per hour; but when to that fact are added the further conditions * * * it would be contrary to common sense to attribute to any reasonable person a lack of appreciation of the fact that such driving of an automobile was likely to result disastrously."

In the instant case we are not dealing alone with the rate of speed. Here was the presence of an "S" curve known to the driver, and if that fact impressed upon his guests the existence of an imminent danger, it is not unfair to assume that a similar consciousness that his act was likely to result in injury to his guests, also occurred or should have occurred to the driver.

This court said in the recent case of Hagglund v. Nelson, 73 P.2d 265, 268: "In the present case we are satisfied the defendant did not drive his automobile directly in front of the rapidly approaching passenger train with the deliberate intention of injuring his guest, but we are convinced that he did act with wanton and reckless disregard of the consequences of his conduct with knowledge, or the possession of facts which were equivalent to actual knowledge, that injury to his guest was likely to occur. Such conduct renders him guilty of willful misconduct."

We find no error in the order or the judgment of the court, and the same are affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

25 Cal.App.2d 542

HOLLAR v. SALINE PRODUCTS, Inc., et al.

Civ. 2116.

District Court of Appeal, Fourth District, California.
March 31, 1938.

1. Landlord and tenant 🔑285(4)

In action to cancel lease and to obtain possession of premises, a finding that tenant denied plaintiff's title on May 29, 1931, and thereafter refused to deal with plaintiff as lessor was proper, notwithstanding that some of the testimony in support of the finding was stricken, where tenant's answer alleged that tenant entered into a lease on May 29, 1931, with another lessor, and that thereafter the plaintiff had no interest in the premises.

2. Escrows 🔑15

Where documents were placed in escrow on condition that they would be returned to owner if certain conditions were not performed, it would be assumed in absence of evidence to contrary that escrow holder returned documents to owner when the conditions were not performed.

3. Landlord and tenant 🔑284(1)

A tenant sued for cancellation of lease and for possession of leased premises could not assert that plaintiff had divested herself of her title to the premises prior to commencement of action by placing an assignment of lease and other documents in escrow, where conditions upon which assignment and documents were placed in escrow were not fulfilled, and assignment and documents were not delivered by escrow holder, but were returned to plaintiff.

4. Landlord and tenant 🔑280½

The holder of legal title can maintain ejectment against a tenant who has denied holder's title and wrongfully attorned to another claimant who has no title to the premises.

5. Landlord and tenant 🔑283

A tenant denying his landlord's title is a "trespasser" and is not entitled to notice to quit before commencement of action by landlord to recover possession of premises.

[Ed. Note.—For other definitions of "Trespasser," see Words & Phrases.]

6. Landlord and tenant 🔑282, 283

A tenant sued for cancellation of lease and for possession of leased premises on ground that tenant had attorned to a stranger to the title could not complain that plaintiff had not given six months' notice of default required by lease or three days' notice before instituting action or notice of default within one year after rent became due as required by statute, where tenant repudiated lease and denied that plaintiff had any interest therein. Code Civ.Proc. § 1161.

7. Trial 🔑392(4)

The failure to make a finding on tenant's affirmative defense that plaintiff suing for cancellation of lease and for possession of premises had divested herself of all interest in the lease and the premises was not error, where the substance thereof was covered in other findings that the interest of the original lessor in the lease had been transferred to plaintiff, and that tenant had attorned to a stranger to the title and had refused to deal with plaintiff as lessor after a named date.

8. Mines and minerals 🔑70(6)

A tenant sued for rents and royalties due under lease could not complain that final judgment was void for uncertainty as not stating for what period the plaintiff was entitled to payment of rents and royalties, where interlocutory judgment left the amount blank and ordered the matter referred for an accounting, and the referee's report was accepted by the court, and the amounts were definite in the final judgment.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ruth Susan Hollar against Saline Products, Inc., a Nevada corporation, and another to cancel a lease and to obtain possession of leased premises. From the judgment, the defendants appeal.

Affirmed.

Hansen & Sweeney, M. M. Holman, Goodwin J. Oppegard, and Holcomb, Holcomb & Kempley, all of Los Angeles, for appellants.

Harry H. Parsons, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to cancel a lease of real property, to obtain possession, and for other relief. By stipulation and order Ralph S. Armour, the present receiver for Saline Products, Inc., has been added as a party appellant.

The complaint alleges that a lease covering the lands in question was entered into in 1921 between one John G. Clark as lessor and X. H. Hollar as lessee; that the interests of said lessor have passed by assignment to the plaintiff and the interests of said lessee have passed to the defendants; that certain rents and royalties due under the lease have not been paid by the defendants; that the defendants have further breached the lease, in that they have attorned to a stranger to the title; and that since May 29, 1931, the defendant corporation has refused to deal with the plaintiff as its landlord and lessor. It is further alleged that the corporation defendant has permitted its affairs to be under the control of a receiver since March 4, 1932, and that said receiver has denied the title of plaintiff and has attorned to a stranger to the title. The prayer is for cancellation of the lease, for immediate possession of the property, and for judgment for all rents and royalties due. By their answers the defendants denied that any of said property was leased by John G. Clark as lessor to X. H. Hollar as lessee, that any interest of the lessor was transferred to this plaintiff, or that any interest of the lessee was transferred to the defendant corporation, that the defendant corporation had been in possession of said land under said lease at any time, and that the plaintiff had ever acquired an interest as a lessor in any such lease or in any lease. The answers further admit that on May 29, 1931, the defendant corporation entered into a lease with Western Salines, Inc., a corporation, covering these lands, and has continued to occupy said lands as the lessee of that corporation. It is then alleged that prior to the last-named date one Knute B. Norswing acquired all the right, title, and interest of this plaintiff in and to said lands and has ever since continued to be the owner thereof, and that the lease between Western Salines, Inc., and this corporation defendant was entered into with the knowledge and consent of said Norswing. The trial court found in favor of the plaintiff on all of the issues, but made a reference for an accounting as to the amounts of rents and royalties due. An appeal was taken which was dismissed as premature, since a final judgment had not been entered. Hollar v. Saline Products, Inc., 3 Cal.2d 80, 43 P.2d 273. Thereafter, an accounting was had and a final judgment was entered from which this appeal was taken.

[1] It is first urged that a finding to the effect that the appellant corporation had denied the title of this plaintiff on May 29, 1931, and since that date had refused to deal with the plaintiff as its landlord and lessor is not supported by the evidence, since one portion of the testimony, which is referred to, was stricken out by the trial court. Without regard to any other testimony this finding was fully supported by the admissions made in the answers. It was alleged that on that date the defendant corporation entered into a lease with another lessor and that from and after that date the respondent had no interest in the property. The plain inference from the allegations made is that the defendant corporation had refused to deal with the respondent as its landlord from and after that time.

[2, 3] The main point relied upon for a reversal is that it conclusively appears from the evidence that the respondent had divested herself of all right, title, and interest in and to said lands and said lease long prior to the commencement of this action. This is based upon the contention that the respondent parted with all her interest in said premises and in any lease thereof by placing certain papers in an escrow. In this connection it appears that on May 28, 1931, X. H. Hollar, the original lessee of this property, entered into an agreement with K. B. Norswing. The appellants contend that by this agreement Norswing acquired both the interests of X. H. Hollar and of this respondent in this property. Under this agreement Norswing was to place in escrow certain money and certain notes and the appellant corporation was to execute and place in escrow notes aggregating $33,500 payable to this respondent, each note containing the provision that it was secured by certain securities in the hands of the escrow holder. Certain stock and other instruments were also to be placed in escrow. The appellants place great reliance on a provision in this contract between Norswing and X. H. Hollar to the effect that all of these things were to be placed in escrow within twenty days, and that "upon each of the parties hereto complying with the terms and conditions of this agreement in so far as the same requires instruments to be de-

livered into escrow, said escrow holder shall make delivery to the respective parties in accordance with the terms of this agreement, and such further instructions, in writing, as may be given by the respective parties, including Ruth Susan Hollar, or her attorney in fact." It is argued that this respondent became a party to this agreement by placing an assignment of the lease, a full release, and other documents into this escrow.

The appellants argue that under the above-mentioned provision of the contract between Norswing and X. H. Hollar the papers were to be placed in escrow within twenty days and were then to be delivered by the escrow holder to the respective parties, that the escrow was entirely completed when the various documents were placed therein, and that when she deposited her papers in this escrow the respondent divested herself of all title and interest in and to this property. They entirely overlook the provision in that contract for further instructions to be given by this respondent as well as the right of the respondent to place her papers in escrow upon her own instructions. It fully appears that in placing her papers in escrow the respondent did so with definite instructions to the escrow holder that if the notes payable to her were not delivered into escrow for her within twenty days all of said documents were to be returned to her, that if the notes were delivered then all documents placed in escrow by her were to be held by the escrow holder as security for the payment of said notes, and that if the notes were not paid at maturity all of these documents were to be returned to her. It is not contended that these notes were all paid, and it is admitted that at least one of them was not paid. We are pointed to no evidence to the contrary, and it must be assumed that the escrow holder carried out the respondent's instructions and returned her papers to her when the notes were not paid. It was admitted at the trial by appellants' counsel that the material papers remained in escrow and were never delivered to Norswing. In so far as anything brought to our attention on this appeal is concerned, the papers placed in escrow by the respondent were never delivered, the conditions upon which they were placed in escrow were not fulfilled, Norswing acquired no title thereto, and the entire claim upon which the appellants rely must fail.

[4-6] The appellants further contend that the judgment is against law and is not supported by the evidence, since a six months' notice of default required by the original lease had not expired at the time this action was begun, because the three-day notice required by section 1161 of the Code of Civil Procedure was not given before the original complaint was filed, and for the reason that a notice of default was not given within one year after the rent became due, in accordance with the provisions of subdivision 2 of section 1161 of the Code of Civil Procedure. In other words, although the appellants have repudiated the lease, have claimed that it was canceled by Norswing, and have denied that the respondent had any interest therein, they now contend that the respondent has not complied with its terms and has not complied with the law governing the relationship of landlord and tenant as it existed between the parties. It is well settled that the holder of the legal title may maintain ejectment against a tenant who has denied his title and wrongfully attorned to another claimant who has no title to the premises, Wise v. Eveland, 134 Cal. 617, 66 P. 1082, and that where a tenant denies his landlord's title the denial makes him a trespasser and he is not entitled to notice to quit before the commencement of an action by the landlord to recover possession of the premises. Smith v. Shaw, 16 Cal. 88; Bolton v. Landers, 27 Cal. 104; Levy v. Henderson, 31 Cal.App. 789, 161 P. 1004; Wedderien v. Wood, 62 Cal.App. 628, 217 P. 577; Kelly v. Teague, 63 Cal. 68; Simpson v. Applegate, 75 Cal. 342, 17 P. 237; Von Glahn v. Brennan, 81 Cal. 261, 22 P. 596; McCarthy v. Brown, 113 Cal. 15, 45 P. 14; Abbott v. Kellogg, 18 Cal.App. 429, 123 P. 227; Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 637.

[7] Some contention is made that the court erred in failing to make a finding on the affirmative defense that the plaintiff had divested herself of all right, title, and interest in and to the lease and lands herein involved. While such a finding was not made, the substance thereof is covered in other findings to the effect that the interest of the original lessor in said lease had been transferred to this respondent, that the appellants had attorned to a stranger to the title, and that since May 29, 1931, they had refused to deal with her as the landlord and lessor.

[8] The last point raised is that the judgment is void for uncertainty because it cannot be told therefrom for what period the respondent was entitled to the payment of rents and royalties. The appellants quote the interlocutory judgment which left the amount blank and ordered the matter referred for an accounting. The referee's report was accepted by the court, and the amounts are definite in the final judgment. Our attention is called to no respect in which the evidence fails to support the judgment as finally entered. In the absence of any showing of error, the usual presumptions apply.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

25 Cal.App.2d 548

DONOVAN v. HOLLAR et al.

Civ. 2153.

District Court of Appeal, Fourth District, California.

March 31, 1938.

1. Trusts ⇨371(1)

A complaint to establish trust in realty which trustees of common-law trust transferred to a corporation on ground that transfer was made pursuant to conspiracy of trustees to defraud trustors was insufficient to state cause of action against a trustor who was not charged with aiding or abetting or having anything to do with the fraud, or to support judgment against trustor depriving trustor of all interest in the realty.

2. Dismissal and nonsuit ⇨65

Under statute requiring dismissal of action not brought to trial within five years after filing of action, where judgment was entered more than five years after complaint was filed and when it was duty of court on its own motion to dismiss the complaint, judgment would be reversed. Code Civ.Proc. § 583, as amended by St.1933, p. 853.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action in equity to establish a trust on the ground of fraud by J. L. Donovan against X. H. Hollar and others. From the judgment, Ruth Susan Hollar, sued as Jane Doe, appeals.

Reversed.

Harry H. Parsons, of San Bernardino, and Frank M. Chichester, of Los Angeles, for appellant.

H. A. I. Wolch, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action in equity to establish a trust on the ground of fraud. The plaintiff claims as a beneficiary under a common-law trust, having purchased shares or certificates of beneficial interest therein, and filed the action for himself and for the benefit of all other persons similarly situated.

The complaint alleges that by written lease dated January 1, 1921, fifteen named persons leased to one John G. Clark, as lessee, certain real property situated in San Bernardino county; that by another lease dated December 1, 1921, Ada Julia Hollar, Ruth Susan Hollar, and Susan Hollar leased to the said Clark, as lessee, certain other lands situated in that county; that the said Clark sublet both of said properties to the defendant X. H. Hollar; that the lessors named in these two leases, with six other named persons, entered into a written agreement and declaration of trust creating a common-law trust, the name of which was afterward changed to Saline Products Company; that under the declaration of trust and under a permit issued by the Corporation Commissioner the "leasehold interest and properties" described and set forth in the above leases were turned over to X. H. Hollar, C. D. Crites, S. A. Court, and W. D. Stroud, as trustees of said trust; that certain shares or certificates of beneficial interest in the trust were given to the various trustors; and that other shares or certificates of beneficial interest were sold to outsiders, including the plaintiff. It is then alleged that X. H. Hollar controlled the actions of the other trustees and that the trustees, for the purpose of evading the trust and defrauding the holders of beneficial interests therein, caused to be organized under the laws of Nevada a corporation known as Saline Products Company, Inc., and transferred to that corporation all of the assets of said common-law trust. It is further alleged that the defendants X. H. Hollar, S. A. Chapman, and Knute B. Norswing conspired together to wrongfully secure to themselves the ownership, control, and domination of the property of the trust estate, and to convert to their own use the trust estate which they hold in trust for the benefit of all of the trustors and beneficiaries holding beneficial interests in the trust estate, and to wrongfully cheat and defraud all those holding beneficial interests in the trust estate by forming this Nevada corporation and turning the assets of the trust estate over to that corporation; that the directors of that corporation are but the creatures of the defendant X. H. Hollar, and were at all times subservient to all of his wishes; that said corporation was organized solely for the purpose of carrying out a fraudulent scheme whereby the assets of the trust estate would be turned over to a corporation bearing a name similar to that of the common-law trust for the purposes of deceiving the beneficiaries of that trust; that the said corporation was organized solely for the benefit of X. H. Hollar and the persons responsible for its organization; that the said X. H. Hollar, in violation of his trust, delivered to the Nevada corporation the purported title to all of the property of the trust estate and had himself appointed general manager of said corporation; that he has since that time acted as such manager and conducted the business for and on behalf of the Nevada corporation; and that he intends to sell shares of stock in the Nevada corporation and otherwise dispose of such shares in a manner that would involve the title of the properties in the trust estate to its great damage and irreparable injury.

It is then alleged that the said Nevada corporation is not the lawful owner of the properties and assets of the trust estate, but is holding the same in fraud of the plaintiff and all other persons similarly situated; that the consideration paid by this corporation to X. H. Hollar and the other trustees of the trust estate was paid during the time when a fiduciary relation existed between Hollar and his cotrustees and the beneficiaries of said trust estate; and that those defendants who were trustees of said trust estate have violated and repudiated their trust and caused the Nevada corporation to be in possession of the real property in question. The prayer is that it be declared that the Nevada corporation holds the real property in question in trust for the plaintiff and other beneficiaries of said trust estate who are similarly situated; that this corporation be required to reconvey said property to the trustees of the trust estate; that a receiver be appointed to take possession of the properties belonging to the trust estate and to manage and conduct said properties; that an injunction issue restraining X. H. Hollar and the board of directors of the Nevada corporation from selling or disposing of shares of stock in that corporation; that the pretended sale of the properties of the trust estate to the Nevada corporation be set aside; that the defendant X. H. Hollar and his cotrustees under the trust estate be declared to be constructive trustees holding the property of the trust estate for the benefit of the plaintiff and all other beneficiaries holding beneficial interests in said trust estate; that the trustees of said trust estate be removed and other trustees be appointed by the court; and for such other relief as may be just and equitable. Copies of the two leases, the sublease, the declaration of trust, and the permit issued by the Corporation Commissioner are attached to the complaint.

The complaint was filed on January 27, 1932. On May 22, 1934, a motion was filed accompanied by a petition signed by one Frank Thomas, as agent for Ruth Susan Hollar, setting forth that the same was filed as a special appearance and in nowise as a general appearance, and for no other purpose than requesting certain specific relief. The petition set forth that Ruth Susan Hollar had an interest in a portion of the real property involved in this action; that she was not a party to this action; that a restraining order had been issued in this action restraining X. H. Hollar from entering upon any of the real property involved herein; that Ruth Susan Hollar had obtained a judgment in the superior court of San Bernardino county affecting a portion of the property and awarding her possession thereof; that an appeal had been filed from that judgment; that certain assessment work must be done upon said properties in order to comply with the mining laws of the United States and in order to prevent the forfeiture of the rights of Ruth Susan Hollar and other original filers of claims; that if such claims were allowed to lapse the rights and interests of the Saline Products Company, Inc., or the Saline Products Company, a common-law trust, would be forfeited to the detriment of all concerned; that it was to the interest of all parties to have said assessment work done immediately; that Ruth Susan Hollar is a resident of the state of Ohio; and that she desires said assessment work to be done by her brother X. H. Hollar. It was therefore asked that an order be made modifying the restraining order previously made by the court to the extent that X. H. Hollar be permitted, as the agent of Ruth Susan Hollar, to go upon said premises and perform said assessment work. On June 22, 1932, the petition and motion for an order modifying the restraining order was denied by the court, and it was further ordered that the complaint be amended by substituting the true name of Ruth Susan Hollar for and instead of the fictitious name of Jane Doe, as a defendant in said action. On July 21, 1934, the default of the defendant Ruth Susan Hollar was entered. On April 6, 1937, the court entered a judgment by default against Ruth Susan Hollar, which recites that she holds all of the property originally leased by her to Clark as a constructive trustee for the plaintiff and other similarly situated beneficiaries of the trust estate mentioned in the complaint; that as such constructive trustee she turn these properties over to the Saline Products Company and the trust estate; that she execute a quitclaim deed to all of the properties to the trustees of the trust estate; that the pretended sale of the properties of the trust estate to the Nevada corporation was a perversion of the trust estate and was void; and that the defendant Ruth Susan Hollar is entitled to take nothing.

[1] Ruth Susan Hollar has appealed from this judgment; the main grounds of appeal being that the complaint fails to state facts sufficient to constitute a cause of action against her, and that the record shows upon its face that the entry of this judgment was barred by section 583 of the Code of Civil Procedure, as amended in 1933, St. 1933, p. 853.

The appellant was not named as a defendant in the complaint as filed. She was mentioned therein only as one of the lessors in one of the original leases to Clark and as one of the trustors in the trust agreement creating the common-law trust. The only allegation in the complaint concerning Jane Doe or any fictitious defendants is as follows: "That the plaintiff is ignorant of the true names of the defendants herein sued as John Doe, Jane Doe, Richard Roe, John Doe Company, Henry First, Henry Second, and Henry Third, and plaintiff therefore prays leave to amend this complaint and any and all subsequent proceedings, pleadings and processes, by inserting their true names when and as they are respectfully ascertained."

The entire purpose of the complaint is to set forth a claimed violation of trust on the part of the trustees of this common-law trust. This is alleged to have taken place through a conspiracy on the part of certain of these trustees who are alleged to have incorporated the Nevada corporation and turned over the assets of the trust estate to that corporation for the purpose of defeating the rights of the trustors and all those who subsequently became trustors through the acquisition of certificates of beneficial interests in said trust. The appellant was not one of the trustees, and it is not alleged that the fictitious defendants were guilty of any breach of trust, that they took any part in the conspiracy, or that they had anything to do with the things complained of. If the things alleged in the complaint be taken as true, the parties named as trustees, who have taken part in the conspiracy and in practicing a fraud, were guilty of a violation of trust and were defrauding the appellant as well as the respondent and other holders of beneficial interests in the trust estate, and the appellant was one of the victims of that fraud and not one of the perpetrators thereof. No allegation of the complaint charges the appellant, either in her true name or under a fictitious name, with in anywise aiding or abetting or having anything to do with the fraud complained of. Assuming, but not holding, that her appearance for the purpose of moving for a modification of the restraining order was a general appearance, and that the complaint was properly amended to make her a party defendant, the fact remains that the complaint, after said amendment, still alleged no fraud upon her part and asked for no relief against her. The complaint states no cause of action against her and does not support the judgment, the effect of which is to deprive her of all interest in these properties. She had an interest as a trustor in this trust estate and presumably some interest arising from the judgment entered in the action in San Bernardino county, which has been referred to. Whatever the facts be and whatever her rights are, they have not been properly litigated in this action and assuming that she knew she had been made a party defendant herein, although the record fails to show that she was ever served with the amended complaint, there was nothing in the complaint to inform her that any relief was asked as against her.

[2] It may further be observed that judgment was entered herein more than five years after the complaint was filed and after the period of limitation provided by section 583 of the Code of Civil Procedure, as amended in 1933, had expired, and when it was the duty of the court upon its own motion to dismiss the complaint. Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716.

The judgment entered against the appellant is reversed.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 622

Ex parte BANTA.

Cr. 3062.

District Court of Appeal, Second District, Division 1, California.

April 6, 1938.

1. Municipal corporations 🔑108

Under a municipal charter providing for submission of an ordinance to the vote of the electors at a special election called within 40 days from the date of the clerk's certificate of sufficiency of the initiative petition and providing that, if majority of qualified votes cast in election were in favor of ordinance, it should become a valid city ordinance, further action by either the city clerk or the city council was unauthorized after the passage of ordinance by the people on submission at a special election.

2. Municipal corporations 🔑108

Under a municipal charter providing for submission of an ordinance to the vote of the people at a special election called for that purpose within 40 days from the date of the clerk's certificate of sufficiency of the initiative petition, an ordinance which received a favorable vote at an election which was called within 40 days from the date of the certificate of sufficiency was not invalid because the election was not held within the 40-day period.

3. Municipal corporations 🔑108

An order calling for an election on an initiative ordinance may be rescinded at any time before the election is held.

4. Municipal corporations 🔑616

The conduct of meat markets and butcher shops is a proper subject of regulation under the police power of a municipality.

5. Constitutional law 🔑46(1)

In a proceeding by a retail meat dealer for a writ of habeas corpus to obtain freedom after conviction for violation of city ordinance making it unlawful to sell uncured or uncooked meats except between designated hours on designated days, the constitutionality of an exception contained in the ordinance authorizing wholesale meat markets and wholesale meat dealers to sell and deliver to ships at any hour of any day would not be determined, since the general provisions of the ordinance were valid as to retail and wholesale dealers.

Original proceeding in the matter of the application of Leonard Banta for writ of habeas corpus.

Writ discharged, and petitioner remanded.

Jonah Jones, Jr., of Long Beach, for petitioner.

John K. Hull, City Prosecutor, and Fred N. Howser, Chief Deputy City Prosecutor, both of Long Beach, for respondent chief of police of city of Long Beach.

YORK, Presiding Justice.

Petitioner was convicted of a violation of subdivision (h) of section 27 of ordinance No. 35 (N.S.), as amended by section 2 of ordinance No. C–1491, ordinances of the city of Long Beach, in that he sold and offered for sale at his place of business uncured and uncooked meat after 6 p. m. on July 30, 1937, the aforesaid day not being a Saturday. Upon application to this court he was granted a writ of habeas corpus by which he seeks to have determined the legality of his arrest and detention.

The section of the ordinance, above referred to, reads as follows: "It shall be unlawful for any person within the City of Long Beach to sell or offer for sale any uncured or uncooked meats at wholesale or retail, or to remove any uncured or uncooked meats from any place of business in the City of Long Beach for the purpose of sale or delivery to dealers or consumers or for the purpose of any delivery, or to receive at any place of business any uncured or uncooked meats, except that on days other than Sunday, New Year's Day, Decoration Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving and Christmas, wholesale meat markets and wholesale meat dealers may sell and deliver between the hours of 6:00 o'clock a. m. and 4:00 o'clock p. m., and retailers of said meats may sell and deliver between the hours of 8:00 o'clock a. m. and 6:00 o'clock p. m.; except further that on Saturdays the lawful hours of sale, receipt and delivery for retailers shall be from 8:00 o'clock a. m. to 7:00 o'clock p. m., except when Saturday falls on any holiday above named; and except that wholesale meat markets and wholesale meat dealers may sell and deliver to ships at any hour of any day."

Petitioner contends that the above ordinance under which he is charged is unconstitutional and void for the following reasons: (1) The initiative measure was not submitted within the time provided by the city charter. (2) The ordinance was never adopted by the city council as required by section 8 of said ordinance. (3) That the ordinance is discriminatory and class legislation.

Petitioner insists that this ordinance was not submitted to a vote of the people within the time provided by the city charter, to wit, 40 days from the date of the certificate of the city clerk as to the sufficiency of the initiative petition (subd. b, sec. 305, city charter); but that 41 days elapsed between the date of the execution of said certificate, March 24, 1937, and the 4th day of May, when the election was held.

A stipulation was filed herein to the effect that, if the city clerk of the city of Long Beach were called as a witness, he would testify as follows: "That the City Council of the City of Long Beach has never passed Ordinance No. C–1491 in accordance with Section 8 thereof. That on the 24th day of March, 1937, the City Clerk executed his certificate to the effect that the initiative petition involved in this action was sufficient; that on the 30th day of March, 1937, said City Council refused to pass said Ordinance set forth in said petition and determined to submit said Ordinance to the vote of the qualified electors of said City at a special municipal election to be called for that purpose. That a special election was duly and regularly called and held on the 4th day of May, 1937, at which time it was found that a majority of the qualified voters voted in favor of said Ordinance."

Section 8 of section 27 of ordinance No. C-1491 provides that the "City Clerk shall certify to the passage of this ordinance by the City Council of the City of Long Beach and cause the same to be posted in three (3) conspicuous places in the City of Long Beach, and it shall take effect thirty (30) days after its final passage"; section 305 of the city charter outlines the procedure whereby the people may propose ordinances and submit them to the city council by an initiative petition. Said section 305 provides, among other things: "If the petition is shown to be sufficient by the certificate of the city clerk, he shall submit the same to the city council without delay and the city council shall either: (a) Pass the ordinance set out in said petition without alteration within ten days after the date of the city clerk's certificate of sufficiency thereon; or (b) Submit the same to a vote of the qualified electors of the city at a special municipal election to be called for that purpose within forty days from the date of said certificate. * * *If a majority of the qualified votes cast is in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city.*" (Italics ours.)

[1] In view of the wording of the italicized portion of said section, it seems apparent that, after the passage of the ordinance by the people, any further action by either the city clerk or the city council would be unauthorized.

[2, 3] From the record it appears that the procedure outlined in said section 305 was followed, in that said election was *called* by the city clerk within 40 days from the date of such certificate of sufficiency. It will be noted that the section provides that the *call* for an election to be held must be issued within 40 days, and not that the election itself shall be held on a date within that period. It also appears from the said section 305 that, if a general municipal election is to be held within 90 days after the clerk's certificate of sufficiency has been submitted to the city council, it would be unnecessary for the clerk to call an election. It was held in the case of Vernon v. Board of Supervisors, 142 Cal. 513, 76 P. 253, that an order *calling* for an election in a proper case may be rescinded at any time before the election is held. (Italics ours.)

[4] As to petitioner's contention that the ordinance is discriminatory and class legislation, it is now settled in this state that the conduct of meat markets and butchershops is a proper subject of regulation under the police power of a municipality. In re Lowenthal, 92 Cal.App. 200, 267 P. 886, 887. The ordinance in the cited case prohibited the sale of uncured or uncooked meats between the hours of 7 o'clock p. m. and 7 o'clock a. m. of the following day, or on any Sunday, and the court there held that "The ordinance under consideration is one designed to protect the public health, and the determination by the legislative body that the regulation is essential, will not be disturbed by the courts. Boyd v. City of Sierra Madre, 41 Cal.App. 520, 521, 183 P. 230. * * * Fresh and uncooked meats are easily infected, and it requires constant supervision to insure their wholesomeness, or abuses will arise which may seriously impair the health of the public. The exclusion of other meats or foodstuffs from the operation of the ordinance therefore does not affect any right of petitioner under the organic law, for it is a proper exercise of the police power of the city."

In the case of In re Gatsios, 95 Cal.App. 762, 273 P. 826, 828, an ordinance was involved which required the closing of meat markets on Sundays and Saturday nights, but authorized kosher meat markets to remain open. The court there held that the exception, allowing kosher meat markets to remain open, resulted in the granting of a privilege to one class from which the other was arbitrarily excluded. "The invalidity of the exception, however, does not necessarily affect the validity of the remaining portion of the ordinance. The supervisors had the power to adopt as a police measure an ordinance closing meat markets on Sunday and after nightfall on Saturday. Aside from the exception the ordinance is complete, is not unreasonable and applies without discrimination to all shops where uncured or uncooked meats are sold. It is the rule that when a proviso in the nature of an exception to an act is invalid the general provisions of the statute are not invalidated thereby unless it clearly appears that the provisions of the exception are so intimately and inherently related to and connected with the general provisions to which the exception relates that the legislative body would not have enacted the former without the latter. People v. Monterey Fish Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186."

[5] The provision in the instant ordinance which petitioner claims results in discrimination reads as follows: "and except that wholesale meat markets and wholesale meat dealers may sell and deliver to ships at any hour of any day." So far as the record here shows, petitioner is a retail dealer in meats and, as the general provisions of the ordinance are valid as to him, as well as to all retailers and wholesale dealers of meats furnishing their product to the general public, it is not necessary for the purposes of this decision that we pass upon the constitutionality of the exception.

The writ of habeas corpus is discharged, and the petitioner is remanded.

We concur: DORAN, J.; WHITE, J.

25 Cal.App.2d 614

FLYNN v. YOUNG.

Civ. 10579.

District Court of Appeal, First District, Division 2, California.

April 6, 1938.

As Modified April 28, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Attorney and client 🔑166(3)

Evidence *held* to justify judgment for $300 in favor of the assignee of a claim for attorney's fee on ground that the contract between the attorney and his client limited the fee to such amount, rather than that it provided for payment for reasonable value of the services.

2. Appeal and error 🔑206(2)

In action on an assigned claim for attorney's fee, the contention that the trial court erred in permitting cross-examination of the attorney regarding charges made to other clients could not be presented for first time in reviewing court, where record disclosed no objection to cross-examination in trial court.

3. Witnesses 🔑286(6)

In action on an assigned claim for attorney's fees, wherein the attorney testified that in preparation of the case he had examined a certain decision and on cross-examination stated that he was not familiar with procedure followed by trial judge in such case, sustaining an objection to a question on redirect examination after recess during which the attorney had examined such decision, as to respect in which such case was distinguishable from facts of case in which attorney had been employed, was not error, where defendant did not make contention that attorneys were incompetent.

4. Appeal and error 🔑1048(3)

In action on an assigned claim for attorney's fees, an order striking from hypothetical questions used, in proving the reasonable value of services of the attorney, statements of the annual income of client for period prior to time when attorney's services were rendered, was not prejudicial error, in absence of showing of materiality of income for such period, where verdict was based on express contract and not for a reasonable value.

5. Appeal and error 🔑883

In action on an assigned claim for attorney's fees, contention of error in striking recital from hypothetical question was not available on appeal, where it was disclosed that the recital was eliminated by consent.

6. Appeal and error 🔑500(3)

In action on an assigned claim for attorney's fees, contention that court erred in limiting evidence as to income of client to years previous to that in which services were rendered, and following, was not available on appeal, where record failed to show any ruling on which error could be predicated.

7. Trial 🔑260(1)

In action on an assigned claim for attorney's fees, the modification of an instruction by deleting last portion thereof was not error, where the portion deleted was fully covered by other instructions given on the subject.

8. Appeal and error 🔑216(2)

In action on an assigned claim for attorney's fees, an instruction on the weight of evidence as measured by number of witnesses which left out clause "which do not produce conviction in their minds" was not prejudicial error, where assignee failed to ask for additional instruction on subject. Code Civ.Proc. § 2061, subd. 2.

9. Appeal and error 🔑1064(1)

In action on an assigned claim for attorney's fees, an instruction containing the expression that the jury "may be satisfied with the testimony of one witness against a great array that might appear on other side" was not prejudicial error. Code Civ. Proc. § 2061, subd. 2.

10. Trial 🔑255(3)

In action on an assigned claim for attorney's fees, failure to instruct jury in accordance with statute relating to weight of evidence was not error in absence of request. Code Civ.Proc. § 2061, subd. 2.

11. Appeal and error 🔑1067

In action on an assigned claim for attorney's fees, wherein defendant asserted defense based on a contract for payment of a designated amount rather than the reasonable value of the services, the modification of an instruction by striking statement that defense founded on special agreement failed entirely, unless established by a preponderance of the evidence, was not prejudicial error, in view of the implied finding of the verdict for defendant that the parties had entered into an express contract, in absence of a showing that the evidence was insufficient to support such implied finding.

12. Attorney and client 🔑167(3)

In action on an assigned claim for attorney's fees, an instruction that attorneys who broke contract or acted in such manner as to make relationship of attorney and client no longer possible were not entitled to compensation was proper under evidence.

13. Appeal and error 🔑1068(4)

In action on an assigned claim for attorney's fees, error, if any, in instruction that attorneys would not be entitled to compensation if they broke contract of employment was not prejudicial, where jury awarded assignee verdict for amount found to be due.

14. Trial 🔑235(7)

In action on an assigned claim for attorney's fees, an instruction that opinions of experts were not controlling and that jurors could form their own opinions was not error.

15. Appeal and error 🔑1068(1)

In action on an assigned claim for attorney's fees, wherein the claim was based on an asserted contract for payment of the reasonable value of the services, error, if any, in instruction that opinions of experts were not controlling and that jurors could form their own opinions was not prejudicial where jury adopted theory that there was an express contract fixing amount of fee, and hence had no occasion to examine opinions of experts on value of services.

16. Trial ⚷235(7)

In action on an assigned claim for attorney's fees, instructions that, unless the jury was satisfied that all the facts on which a hypothetical question was based were true, the jury could disregard entirely the testimony of the expert, was not error, in view of the permissive language used.

17. Trial ⚷192

In action on an assigned claim for attorney's fees for services rendered in divorce action, instruction that validity of property settlement agreement executed by the parties prior to commencement of the divorce action was not involved was not error, where such was an admitted fact.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action on assigned claim for attorney's fees by A. Flynn against Earle M. Young. From an adverse judgment, the plaintiff appeals.

Affirmed.

Elkins & Wright, and William F. Herron, all of San Francisco, for appellant.

Milton D. Sapiro, of San Francisco, for respondent.

STURTEVANT, Justice.

As assignee, the plaintiff sued to recover moneys alleged to have been earned by Elkins & Wright, her assignors, as attorney fees. She pleaded a common count, claiming $2,150 as the reasonable value of the services rendered. The defendant answered setting forth numerous denials and as new matter he alleged that the services of plaintiff's assignors were rendered pursuant to certain express contracts and not otherwise.

For several years prior to 1935, Earle M. Young and Dorothy H. Young were husband and wife, residing at Mill Valley in Marin county. They had one child, a daughter. They were not possessed of any community property, but the husband was a dentist engaged in the practice of his profession both in Mill Valley and San Francisco. Disagreements having arisen between the couple they separated, executed a property settlement, acted thereunder, and, about a year after the separation, Earle M. Young filed a complaint for divorce at Reno in the district court of Nevada. The name of the attorney who filed said complaint is not stated in the record, but the record does disclose that plaintiff's assignors did not represent either Dr. or Mrs. Young in that action. Some preliminary proceedings were had in the Nevada action, but it was dismissed and no judgment was rendered therein.

Just before that action was dismissed, Dr. Young met and had a conversation with Leo A. Elkins. The latter and Amos W. Wright were attorneys associated as partners and engaged in the practice of their profession in San Francisco. The conversation between Dr. Young and Mr. Elkins was with reference to taking depositions in the Nevada action. That conversation did not lead to an employment and neither Mr. Elkins nor Mr. Wright took any part in said action. However, after the Nevada action was dismissed, Dr. Young and Mrs. George, his secretary, called on Mr. Elkins and discussed with him the matter of commencing an action in San Francisco. That discussion led to an agreement under the terms of which Elkins & Wright undertook to commence an action in the superior court in San Francisco and obtain a divorce for Dr. Young. As stated above, it was the claim of Elkins & Wright that the amount of their fee was not agreed upon, but rested on the reasonable value of their services. On the other hand it was the claim of Dr. Young that Mr. Elkins stated his firm would obtain the decree for $200 and that the doctor agreed to that charge. Dr. Young so testified and Mrs. George, who was present, testified to the same effect. A complaint was filed on the 5th day of March, 1936. Later Mrs. Young appeared by her attorneys and filed an answer and cross-complaint. The cross-complaint was answered and a trial was had on the issues so framed. The result of the trial was that on June 16, 1936, Dr. Young was awarded a decree. On June 25, 1936, the defendant handed to Mr. Elkins in the office of the latter a check for $200. Mr. Elkins demurred as to the amount and the next day mailed the check back to Dr. Young. Later Mrs. Young served and filed a notice of motion for a new trial and a motion to require Dr. Young to pay the costs of securing a transcript and of attorneys' fees for presenting that motion. Dr. Young and his attorneys were still wrangling over the amount of the fee to be paid the latter for trying the main case. Dr. Young testified that he agreed to pay them $50 to represent him on that motion and that the subject matter of the fee to be paid in the main case was left open for further discussion. Mr. Elkins' testimony was to the same effect. Subsequently Elkins & Wright appeared and represented Dr. Young, the motion was dismissed, but shortly thereafter another motion was made to the same effect. Dr. Young testified that he made an express contract to pay Elkins & Wright $50 for representing him on the second motion, on presentation of which costs were granted. The motion for new trial was not presented or ruled on within the time allowed by law. Notice to that effect was given August 19, 1936. This action was commenced August 22, 1936. Dr. Young changed his attorneys on August 28, 1936, and Mr. Sapiro was substituted in the place of Messrs. Elkins & Wright.

[1] As coming within the scope of the employment of her assignors, the plaintiff introduced evidence of certain interviews between Mr. Elkins and Dr. Young prior to the dismissal of the Nevada action and she introduced evidence of the services rendered in the action in San Francisco. She also introduced evidence of the reasonable value of all of said services. Some of the testimony showed a value as high as $2,500. By its verdict the jury awarded the plaintiff $300. Pointing to these facts the plaintiff claims the award was grossly inadequate. If we adopt the plaintiff's theory that contention is well founded. But the record shows a direct conflict as to whether Elkins & Wright in any manner participated in the Nevada litigation and, addressing ourselves to that factor, it may not be said the jury's verdict was not supported by the evidence. As to the services performed in the litigation in San Francisco, Dr. Young gave direct testimony that all of said services were rendered pursuant to the express contracts above mentioned. There were admissions on the part of Mr. Elkins that tended to support rather than contradict the testimony of Dr. Young. In support of the verdict we must assume the jury adopted the theory of Dr. Young and discarded the theory of the plaintiff. Under those circumstances the contention that the amount of the verdict was grossly inadequate has no support.

[2] The plaintiff called Mr. Elkins as a witness. He testified regarding his activities in behalf of the defendant. On cross-examination he was examined regarding his charges made to other clients. The plaintiff contends the trial court erred in permitting such cross-examination. However, the record discloses that no objection to that line of cross-examination was made in the trial court. The point may not be presented in this court for the first time.

[3] The plaintiff also called one of her assignors, Mr. Wright. The witness testified that the validity of the property agreement that had theretofore been made between Dr. and Mrs. Young became a material question in the San Francisco litigation. He testified to certain facts regarding the scope of the examinations made by Mr. Elkins and himself into the legal questions involved. He testified that among other cases they examined the decision entitled Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715. On cross-examination he was asked whether he was familiar with the procedure followed by the trial judge in that case to protect rights under a property settlement. He replied that he was not. During the recess the witness examined the Locke Paddon Case. On redirect examination, after the recess, the witness was asked, "In what is the Locke Paddon Case distinguishable from the facts as they were presented to you in the case of Young v. Young?" The defendant's objection was sustained. The ruling was clearly correct. The defendant at no time was making the contention that Elkins & Wright were incompetent.

[4] In proving reasonable value the plaintiff prepared and used a hypothetical question. Among other provisions it contained statements of the annual income of Dr. Young for the years 1929–1931 and of his monthly income during the years 1932, 1933, and 1934. On motion those recitals were stricken out. The plaintiff asserts that the order striking out was error. For two different reasons we find no prejudicial error in the ruling. In the first place nothing is set forth in the record showing that the defendant's income for the years 1929–1934 was material when considering the services of plaintiff's assignors which commenced in March, 1936. In the second place, as shown above, the jury's verdict was based on express contracts and not on the theory of reasonable value. It is therefore patent that the provisions of the hypothetical question and the answers made thereto did not weigh with the jury in arriving at its verdict.

[5] The plaintiff had inserted in the hypothetical question a recital to the effect that

the defendant interfered in the conduct of the trial of the divorce case. The court struck out that recital. At this time the plaintiff assigns such order as error, but the record discloses that the said recital was eliminated by consent.

[6] In receiving evidence as to the income of the defendant, the plaintiff claims that the trial court limited the evidence to the year 1935 and following. That claim is not sustained by the record. There was some discussion on the subject but no ruling on which the plaintiff may at this time predicate error.

[7] Finally, the plaintiff makes nine different attacks on the instructions. One of the attacks on the instructions is that the trial court erred in modifying a certain instruction by deleting the last portion thereof. We find no merit in the attack. The portion deleted was fully covered in other instructions given on the subject.

[8] Instruction No. 8 was on the weight of the evidence as measured by the number of witnesses. Code Civ.Proc. § 2061, subd. 2. The court left out the clause "which do not produce conviction in their minds." Plaintiff did not ask for any additional instruction on the subject. The omission did not constitute prejudicial error. People v. Chun Heong, 86 Cal. 329, 333, 24 P. 1021.

[9] Instruction No. 10, as given, contained the expression "The jury may be satisfied with the testimony of one witness against a great array that might appear on the other side. * * *" The instruction did not contain prejudicial error. People v. Chun Heong, supra.

[10] Complaint is made that the trial court failed to instruct the jury in accordance with Code of Civil Procedure, § 2061. It was not asked to do so.

[11] Instruction No. 26 was modified by striking from the end thereof "* * * and unless he establishes such special agreement by a preponderance of the evidence his defense founded thereon fails entirely." In making the modification the trial court did not commit a prejudicial error. The fact that the jury found for the defendant contains the implied finding that the parties had entered into express contracts. If the plaintiff would complain at this time she must show the evidence was insufficient to support said implied finding. This she cannot do because there was an abundance of evidence to support said finding.

[12, 13] The trial court instructed the jury as follows: "You are instructed that when a client employs an attorney for a specific action that is an entire contract; and if you find that the attorneys broke the contract themselves or acted in such a manner as to make the relationship of attorney and client no longer possible, you must find that the attorneys are not entitled to any compensation." The plaintiff contends there was no evidence that justified the giving of said instruction. We think there was. However, the jury did not apply the rule. Notwithstanding that Elkins & Wright refused to appear for this defendant and oppose the granting of a new trial in the action entitled Young v. Young, the jury awarded the plaintiff a verdict in the sum of $300. Even though the instruction were erroneous, and it was not, it did not constitute prejudicial error in the case.

[14, 15] Instruction No. 37 in effect informed the jury that the opinions of experts were not controlling and that the jurors could form their own opinions. It is claimed the instruction is erroneous. We see no error in it, but even though there were error it was not prejudicial. As shown above, the jury adopted the theory of the defendant that there was an express contract and acted thereon. It is plain, therefore, that the jury had no occasion to examine the opinions of experts on values.

[16] Instruction No. 43 dealt with the hypothetical question propounded to the expert witnesses. The instruction contained the following statement: "Unless you are satisfied that all of the facts upon which the question was based are true, you may disregard entirely the testimony of such expert." The plaintiff contends that said statement was erroneous. Treadwell v. Nickel, 194 Cal. 243, 263, 228 P. 25. A comparison of the permissive language used in the instruction before us and the peremptory language used in the instruction discussed in the Treadwell Case discloses that in the instant case there was no error. Martinelli v. Poley, 210 Cal. 450, 460, 292 P. 451.

[17] The trial court instructed the jury that the validity of the property settlement agreement executed by the parties was not involved in the action of Young v. Young. There was no error in making the statement as it was an admitted fact.

Finally, it is contended that the trial court in effect directed the jury to disregard the testimony of plaintiff's experts. The plain answer to that contention is the trial court did not do so.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

25 Cal.App.2d 529

Ex parte JANG.

Cr. 1998.

District Court of Appeal, First District, Division 1, California.

March 29, 1938.

1. Perjury 🔑13

Under statute making bribery of witness upon understanding or agreement that testimony of witness shall be thereby influenced a felony, essential element of offense is that bribe be given upon understanding or agreement that testimony of witness shall be influenced. Pen.Code, § 137.

2. Perjury 🔑13

Under statute making bribery of witness upon understanding or agreement that testimony of witness shall be influenced a felony, use of words "agreement" or "understanding" carries with it the concept of a corrupt bargain, since there can be no agreement or understanding without a meeting of minds. Pen.Code, § 137.

3. Criminal law 🔑238

Evidence on preliminary examination charging accused with bribery and failing to show that officers agreed to do anything in return for payment of money, or that there was an understanding that they would do anything, and failing to show that accused asked officers to have charge against another person dismissed or that he asked them to withhold evidence or to perjure themselves, failed to show a meeting of the minds and understanding or agreement so as to constitute the offense of bribery. Pen. Code, § 137.

4. Perjury 🔑13

Under statute making bribery of a witness on understanding or agreement that testimony shall be influenced a felony, guilt of an accused does not depend on the intention of the witness to carry out the understanding or agreement to falsify his testimony, but it is essential that bribe be given upon such understanding or agreement. Pen.Code, § 137.

5. Bribery 🔑1(2)

Under statute relating to the giving of bribe to executive or ministerial officers to influence their actions as such, it is necessary to prove only that the bribe was given with the intent to influence actions of such officers, without showing an understanding or agreement, such as is necessary under statute relating to falsifying testimony, understanding or agreement. Pen.Code, §§ 67, 67½, 137.

6. Habeas corpus 🔑25(1)

Where evidence on preliminary examination failed to establish that relator had any understanding or agreement to give officers bribe for falsification of testimony, petitioner was entitled to his discharge. Pen. Code, § 137.

Proceeding in the matter of the application of Bob Jang for writ of habeas corpus. Writ granted, and prisoner discharged.

Anthony Y. Seto, of San Francisco, for petitioner.

Joseph A. Garry, Asst. Dist. Atty., of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for respondent sheriff of the City and County of San Francisco.

KNIGHT, Justice.

Petitioner by this proceeding in habeas corpus seeks to be released from the custody of the sheriff, after having been held to answer for trial in the superior court on a charge of having given a bribe to Marshall Burnett, an inspector of the state narcotic division. Shortly before the alleged illegal transaction took place Burnett and Inspector Armstrong arrested one Quon Choy for illegal sale of narcotics; and the substance of the charge set forth in the complaint filed against petitioner is that Burnett was about to be called as a witness in the Quon Choy case and that petitioner gave him a bribe of $400 "upon the understanding and agreement that the testimony of said witness should be influenced." The ground urged in support of the petition for discharge is that the evidence taken at the preliminary examination fails as a matter of law to establish any such understanding or agreement.

Preliminarily, it may be stated that there are several Penal Code sections denouncing as a crime the giving of bribes, among them being sections 67, 67½, and 137. The first two are embraced in title 5, part 1, entitled "Crimes by and Against the Executive Power of the State." Those sections provide generally that every person who gives or offers any bribe to any executive officer of the state or any ministerial officer, employee, or appointee of the state, county, or city therein or political subdivision thereof with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding is guilty of a crime. The third section above referred to, No. 137, is made part of chapter 6, title 7, part 1, of said Code, which is headed "Falsifying evidence"; and the complaint herein was based on the first clause thereof, which is as follows: "Every person who gives or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, * * * is guilty of a felony."

[1] As will be noted, the essential element of the offense thus defined is that the bribe is given upon the *"understanding or agreement* that the testimony of such witness shall be thereby influenced." (Italics ours.) But as contended by petitioner, the evidence taken at the preliminary examination, which consisted alone of the testimony given by Burnett, fails to establish that element of the crime. On the contrary, it would seem that the testimony of the witness directly negatives the existence of any such understanding or agreement.

Summarized, the facts disclosed thereby are as follows: A few days after the arrest of Quon Choy, petitioner called at the office of the state narcotic division in San Francisco, and inquired for the officers who had made the arrest. Being referred to Inspectors Burnett and Armstrong, who were there present, he stated he would like to talk with them somewhere away from the office; and they made an appointment to meet him the next day at the post office building. At that time petitioner informed them that his home was in Bakersfield, where he operated a restaurant; that he knew Quon Choy only casually, but was well acquainted with his wife and two sons, the latter having worked for him at his restaurant during the summer vacations; that Quon Choy was good to his family, but that his wife had been sick and that he had encountered misfortune in other respects; that Quon Choy's wife had written him following her husband's arrest asking if he could send her some money, and that in response to the letter he came to San Francisco to see what he could do; that petitioner then asked them if they really thought Quon Choy was guilty, and if there was anything he could do to help him. They told him the only thing he could do was to induce Quon Choy to reveal the source of the supply of narcotics he had been selling, stating that if he could get any information from Quon Choy regarding the larger peddlers and was instrumental in causing the apprehension of these peddlers they "would tell it to the Judge when Quon Choy was held before the superior court for sentence." Petitioner replied that he did not know much about it but he would see what he could do. The following day they met petitioner again by appointment, but nothing important transpired, more than that petitioner asked them "to help out Quon Choy." The next day, Saturday, they met petitioner by appointment in front of the customs house. This time they were accompanied by another inspector; also by the chief of the narcotic division, and a customs inspector, and during the conversation petitioner stated that if they "would help out Quon Choy"—"make things easy" for him, he "would take care of them"; that he could get about $400 or $500, saying in this respect that if he paid the money he "would like to see him (Quon Choy) get a suspended sentence, even if it was five or ten years," that "it didn't matter—a five or ten year suspended sentence was all right." The inspectors again told him, however, that they could do nothing for Quon Choy unless he revealed the identity of other narcotic peddlers. The following Monday noon Inspectors Burnett and Armstrong again conferred with petitioner in front of the customs building, and after some preliminary conversation petitioner stated that if they would "make things easy for Quon Choy" he had the money with him. They asked how much he had, and he replied $400; whereupon Inspector Burnett took the money and after counting it placed petitioner under arrest.

[2, 3] It has been held in effect that the use of the words "agreement" or "understanding" in statutory provisions denouncing bribery as a crime necessarily carries with it the essential concept of a corrupt bargain (People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811), and as said in the decision in the case just cited, there can

be no agreement or understanding without a meeting of minds—a person cannot agree with himself. And here the transcript of Burnett's testimony shows affirmatively and without conflict that neither he nor any other person connected with the narcotic division ever agreed to do anything in return for the payment of the money, or that there was ever any understanding that they would do anything. His testimony in this regard was as follows:

"Q. Did you tell him in return as to what you could do? A. No.

"Q. You didn't tell him what you were going to do if he paid that money over? A. No.

"Q. Didn't Mr. Armstrong tell him what he was going to do for him? A. No.

"Q. Didn't Mr. Armstrong or you say to him that you thought you could get probation for him? A. No. He said * * * if he gave us the money he would like to see this man get a suspended sentence, even if it was five or ten years.

"Q. In other words, he would like to see the defendant Quon Choy get a suspended sentence of five or ten years? A. Yes, he said it didn't matter—a five or ten year suspended sentence was all right."

Furthermore, the witness stated that at no time did the petitioner ask them to have the charge against Quon Choy dismissed, nor did he ask either of them to withhold any evidence or to perjure themselves. As will be noted from the foregoing, there never was any meeting of minds, and hence no understanding or agreement, such as required by section 137.

Respondent stresses the request made by petitioner that the inspectors make it easy for Quon Choy, but manifestly, as shown by the context of Burnett's entire testimony, such request referred to the matter of securing a suspended sentence or some light punishment for Quon Choy. In any event, according to Burnett's testimony, there was never any acquiescence in such request, and consequently no understanding or agreement with respect thereto.

[4, 5] In order that our decision herein may not be misunderstood, it may be well to state that it is doubtless the law that the guilt of a person accused of bribery under section 137 does not depend upon the intention of the witness to carry out the understanding or agreement to falsify his testimony. People v. Schultz, 18 Cal.App.2d 485, 64 P.2d 440. But clearly, such rule does not do away with the burden of establishing, as required by the plain provisions of said section, that the bribe was given upon such understanding and agreement. In this particular the requirements of section 137 are entirely different from those of sections 67 and 67½ relating to the giving of bribes to executive or ministerial officers, etc., to influence their actions as such. Where the charge is based on either of those sections it is necessary to prove only that the bribe was given with the intent to influence the actions of such officer, etc.

[6] Nor are we to be understood as holding that the transaction in question did not constitute bribery under either section 67 or section 67½, and that petitioner may not be prosecuted accordingly. We are dealing here only with section 137; and since the evidence fails as a matter of law to establish the essential elements of the bribery defined thereby, petitioner is entitled, in so far as any alleged violation of that section is concerned, to his discharge; and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

25 Cal.App.2d 667

PEOPLE v. McCARTHY et al.

Cr. 3080.

District Court of Appeal, Second District, Division 2, California.

April 11, 1938.

Rehearing Denied April 22, 1938.

Hearing Denied by Supreme Court May 9, 1938.

1. Criminal law 🔑1144(13)

It is duty of District Court of Appeal to review evidence most favorable to people on appeal from conviction of crime.

2. Criminal law 🔑1144(13)

The District Court of Appeal cannot consider plaintiff's testimony on appeal from conviction of crime.

3. Larceny 🔑55

Evidence for people in trial for grand theft from person *held* sufficient to show that defendants took part in perpetration of crime.

4. Criminal law ⚷562

Evidence of felonious intention, manifested by circumstances connected with offense charged, and accused's sound mind and discretion, is sufficient to sustain conviction. Pen.Code, § 21.

5. Criminal law ⚷396(2)

When part of declaration, conversation, or writing is given in evidence by one party, the whole of it on same subject may be inquired into by other party. Code Civ.Proc. § 1854.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

J. F. McCarthy and another were prosecuted for an offense, and named defendant was convicted of grand theft from the person, and he appeals.

Affirmed.

Paul Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

[1] This is an appeal from a conviction of grand theft from the person and from the order denying a motion for a new trial. Viewing the evidence most favorable to the People, which it is our duty to do, there had been some complaints about police officers "rolling drunks" in the district where the crime took place, and at about 3 o'clock a. m. W. C. Tilden drove out and parked his car at the side of the road, with the right front wheel over the curb. He had $15 in money, the numbers of which had been expressly taken, which consisted of two $5 bills and five $1 bills. Tilden then poured some whisky on the front of his shirt, washed his mouth out with it, and spilled a little on the front of the car. He did not swallow any of the liquor. The money, the numbers of which had been previously noted, was in his right front pants' pocket.

Within five minutes the defendant, a police officer, and his associate came along in a police traffic car. The two officers then came over to Tilden, flashed their lights on him and asked his name. Tilden simulated drunkenness. He mumbled around. One of the officers told the other that he had better drive Tilden off of the curb, that it was kind of a bad place, and this was done. One of the officers went to the right side of the car and one to the left. Both of them asked him questions for identification. At this time they began searching him, and the officer on the right searched all his pockets, coat and pants. When the officer put his hand into the right front pocket of Tilden's pants he said to the other officer, "Well he has got money anyway," and took it, and then immediately thereafter they closed the doors and left without speaking another word. Tilden did not give any one permission to take the money, and the officers took the money without his consent. Some time later in the same night the defendant and his partner were searched. The defendant had seven dollars of the identical money in his wallet, and his partner had eight dollars.

[2-4] The defendant in his appeal brings forward his own testimony. He testified that he did not hear any conversation between Tilden and his partner Ryan. He denied hearing Ryan say, "Well, he has got money anyway." He denies that he saw any money at all while he was at Tilden's car, but that after they had gone several blocks from the car Ryan handed him the money and said that he had found it on the curb. "And that is all that was said about it. He gave me some money and I stuck it here, in my shirt pocket; and, when I got home, I took it out of my shirt pocket and put it in my wallet." Relying upon this evidence, the defendant contends that a conviction cannot be had without any evidence or proof of the intent to commit the offense, and contends that if a defendant had no knowledge of a theft until after its commission, even though he later received the stolen goods into his possession, he cannot be guilty of theft.

The trouble with the defendant's position is that on appeal this court cannot rely upon his testimony. It is the duty of this court to view the evidence most favorable to the People, and under this evidence, as above set forth, there was substantial evidence that the defendant took part in the perpetration of the crime. It is sufficient if a felonious intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. Pen.Code, § 21.

The defendant next contends that there can be no conviction of grand theft from the person without any evidence or proof of the taking or carrying away by this appealing defendant. What we have already said is applicable to this contention also.

He next contends that a conviction of grand theft from the person cannot be sustained when the appealing defendant did not know of any taking until after it had happened. What we have already said is an answer to this contention also.

The defendant next contends that the mere possession of stolen property cannot support the conviction of grand theft from the person, and further, that where two persons are joined as defendants and there is no charge of conspiracy and no evidence thereof, and one defendant has no knowledge of any theft until after its alleged commission and did not participate and did not have knowledge of any taking, a conviction cannot be sustained as to the one defendant who did not participate in said taking. Both of these contentions are based upon the defendant's review of the defendant's own testimony. There is substantial evidence in the record from which the inferences may be drawn that the defendant participated in the crime. In the case of People v. McClain, 115 Cal.App. 505, at page 507, 1 P.2d 1085, 1087, the court said: "When money is stolen, proof that a part of it, on the following day, was found on the person of another in the vicinity, certainly tends, when not satisfactorily explained, to raise a presumption that he is the guilty party; and if an explanation is attempted by the accused, it is for the jury to judge of its truth and plausibility."

[5] On cross-examination the defendant asked Tilden what his instructions were. The instructions had been given to him orally. He related them. On redirect examination the district attorney asked Tilden the entire circumstances of his instructions. The defendant now contends that this evidence should not have been admitted. When a part of a declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. Code Civ.Proc. § 1854; 10 Cal.Jur. 1080.

Finally, the defendant contends that the court erred in denying his motion for new trial, but such contention is merely a further presentation of the contentions which have already been raised and which have been adequately covered herein.

Judgment and order denying new trial are affirmed.

We concur: WOOD, J.; McCOMB, J.

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25 Cal.App.2d 630

PEOPLE v. ARD.

Cr. 3081.

District Court of Appeal, Second District, Division 1, California.

April 7, 1938.

1. Poisons ⚷4

Where nurse obtained narcotics upon prescription, to administer to patient whom nurse was taking outside the state, and patient died while outside the state, but nurse returned, retaining possession of narcotics, nurse was guilty of illegal possession. St. 1929, p. 380, as amended.

2. Criminal law ⚷1023(10)

An appeal does not lie from a sentence.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Alfred Ard was convicted of possession of narcotics, and he appeals.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

YORK, Presiding Justice.

Appellant was charged with and convicted upon two counts of violation of the State Narcotic Act, St.1929, p. 380, as amended, both counts alleging a prior conviction of felony. Count I alleges the possession of a preparation of morphine containing more than one-fourth grain of morphine to the avoirdupois ounce; and count II charges possession of a preparation of codeine containing more than one grain of codeine to the avoirdupois ounce. The admitted facts are that the appellant was a trained nurse and received the narcotics referred to in the information as such nurse for use in the care of a patient whom he was attending and transporting to the state of Texas; that he received said narcotics for the purpose of administering them to said patient while en route and for treatment after their arrival in Texas. Within 30 days of their arrival in Texas, the patient died and appellant returned to California, thereafter having in his possession the narcotics which were found upon his person at the time of his arrest.

[1] Appellant contends that by reason of the fact that the original possession of the narcotics by him was legal that he could not thereafter be charged with illegal possession thereof. As the right to the possession of the narcotics ceased upon the death of the patient for whom they had been prescribed, appellant's act of taking them into his possession and thereafter having such narcotics with him in the state of California, thereafter keeping them in his possession, constituted an illegal possession of the drugs. He had no authority under such prescription to possess the drugs at the time of his arrest, which was some 30 days after the death of the patient for whom the prescription was issued.

Although appellant did at one time come within the exception that it is unlawful to possess narcotics "except upon the written order or prescription of a physician and surgeon," his possession on the day of his arrest—some 30 days after the death of the patient—was not a possession upon such written order or prescription, even though he originally obtained the narcotics upon a valid prescription during the lifetime of his said patient.

[2] The purported appeal from the sentence is dismissed. The judgment and order appealed from are affirmed.

We concur: DORAN, J.; WHITE, J.

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25 Cal.App.2d 632

KING v. UNGER et al.

Civ. 11686.

District Court of Appeal, Second District, Division 2, California.

April 7, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Appeal and error 🔑927(7)

In reviewing a judgment based on a directed verdict for defendant, the evidence must be viewed most favorable to plaintiff.

2. Automobiles 🔑217(1, 5)

A pedestrian crossing intersection was under a continuing duty to exercise ordinary care, but was not under a continuing duty to look to the left.

3. Automobiles 🔑206

Where pedestrian waited for traffic signal to change to "Stop" for all traffic on street which pedestrian intended to cross and then observed that intersection was free of automobiles coming from his left, pedestrian had right to assume that traffic would obey the "Stop" signal.

4. Automobiles 🔑245(72)

Where pedestrian waited for traffic signal to change to "Stop" for all traffic on street which pedestrian desired to cross and then observed that intersection was free of automobiles coming from his left, whether pedestrian, struck by automobile which crossed intersection notwithstanding "Stop" signal, acted as a reasonably prudent person in not again looking to left after starting across street, was for jury.

5. Pleading 🔑237(1)

Amendments of pleadings to conform to proof should be allowed with the greatest liberality, and in proper circumstances it is error to refuse permission to so amend.

6. New trial 🔑18

Where sole allegation in complaint was that defendants drove, operated, maintained, and controlled the automobile causing injuries, but defendants acquiesced in trial of all issues affecting liability as owner of automobile and as principal of driver, the trial court had right to grant new trial where court had denied or indicated that it would not grant motions to amend complaint to conform to proof.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles; Myron Westover, Judge.

Action by George R. King against Milton R. Unger and others to recover damages for personal injuries. From an order granting plaintiff a new trial, the defendants appeal.

Affirmed.

Charles H. Goebel, of Los Angeles, for appellants Milton R. Unger and Mills Transfer Co., Inc.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for appellants

Herbert E. Woodward, Inc., and Herbert E. Woodward.

Paul Blackwood, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by defendants from an order by the trial court granting plaintiff a new trial after the jury, at the instruction of the trial judge, returned a verdict in favor of the defendants in an action to recover damages for personal injuries.

[1] Viewing the evidence most favorable to the plaintiff, as we must do in reviewing a judgment based upon a directed verdict (In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768), the facts are these: At about 10 a. m. on February 27, 1937, plaintiff arrived at the northwest corner of Broadway and Ninth streets, where they intersect in the city of Los Angeles. The traffic being opened on Broadway and closed on Ninth street, plaintiff stopped at the curb and waited for the signal to change to "Go" for southbound traffic. When the signal released traffic on Broadway, he looked to his left (east) to see if there were any cars in the intersection and, seeing none, stepped off the curb and proceeded across Ninth street. He did not again look to his left but, while in the crosswalk sixteen feet from the northerly curb of Ninth street, he was struck by an automobile driven in a westerly direction on Ninth street by defendant Unger, who had entered the intersection at a speed of twenty-five miles per hour after the traffic signal had closed east and west traffic on Ninth street. Defendant's car was 150 feet away when plaintiff looked.

Defendant Unger was the president of defendant Mills Transfer Company, Inc., and the automobile which he was driving had been loaned to him by its owners, defendants Herbert E. Woodward, Inc., and Herbert E. Woodward.

The contention of the defendants is that the plaintiff was guilty of contributory negligence as a matter of law, arguing that it was not only the plaintiff's duty to look immediately before placing himself in a position of danger, but that this duty to look is a continuing duty and is not met by looking once and then looking away, and he relies upon: Moss v. H. R. Boynton Co., 44 Cal. App. 474, 476, 186 P. 631; Mayer v. Anderson, 36 Cal.App. 740, 742, 173 P. 174; Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 579, 59 P.2d 856.

[2] The plaintiff looked to the left once. It is not the law that he owed a continuing duty to *look to the left*. The law is that he was under a continuing duty to exercise ordinary care. Salomon v. Meyer, 1 Cal. 2d 11, 32 P.2d 631; McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309; Long v. Barbieri, 120 Cal.App. 207, 215, 7 P.2d 1082; Filson v. Balkins, 206 Cal. 209, 212, 273 P. 578; Walker v. Mason, 109 Cal.App. 361, 293 P. 125.

[3, 4] Plaintiff, having waited for the signal to change to "Stop" for all Ninth street traffic, and for the signal to change to "Go" for Broadway traffic, and having then observed that the intersection was free of automobiles coming from the left, proceeded south in the pedestrian crosswalk crossing Ninth street, and had a right to assume that the traffic on Ninth street would obey the "Stop" signal. It cannot be said that he was guilty of contributory negligence as a matter of law in not looking again to the left after starting across the street. Whether he acted as a reasonably prudent person was a question of fact for the jury.

The sole allegation in the complaint was that the *defendants* drove, operated, maintained and controlled the automobile. The defendant contended at the trial and the court found that it was incumbent upon the plaintiff to prove that all of the defendants were driving the automobile in order to prove the cause of action against *all* of the defendants, whereas the evidence showed unequivocally that defendant Unger was the driver of the automobile and that none of the other defendants were present at the scene of the accident or had anything to do with the driving, operating, maintaining, or controlling of the automobile at the time of the accident, and therefore the evidence failed to sustain the allegations of the complaint so far as all defendants other than the defendant Unger were concerned.

[5, 6] However, the defendants acquiesced in the trial of all issues affecting their liability, the Woodwards as owners of the car giving permission for its use, and Mills Transfer Company, as principal of the defendant Unger. The defendants do not contend that there was not sufficient proof. The contention is that the pleadings

were not sufficient. The courts have uniformly held that amendments to conform to the proof should be allowed with the greatest liberality and that in proper circumstances it is error to refuse such permission. The defendants argue that the trial court had a right to deny the plaintiff's motion to amend the complaint and to grant a nonsuit, but they do not discuss in this connection that it also had the right to grant a new trial because of such ruling. In our view the court properly exercised its discretion in granting a new trial for the purpose of permitting the application for amendment. Rabe v. Western Union Tel. Co., 198 Cal. 290, 299, 244 P. 1077.

The defendants contend that the plaintiff did not make any motion to amend as to the Mills Transfer Company, but the court had already indicated that it would not grant any motions to amend the complaint at such a late date in the trial. We will not discuss whether such an amendment was necessary. If so, the trial court having definitely ruled that any suggestion of an amendment was too late, it did not abuse its discretion in granting a new trial as to the Mills Transfer Company.

Order affirmed.

I concur: WOOD, J.

McCOMB, Justice (dissenting).

I dissent. In my opinion the decision of the present case is dependent upon the answer to this question: *Was plaintiff contributorily negligent as a matter of law in failing to look in an easterly direction from the time he left the curb until he was struck by the automobile operated by defendant, Unger?*

In my view of the decisions of the Supreme and appellate courts of this state this question must be answered in the affirmative. The law is settled that there is a duty devolving upon a pedestrian about to cross a congested street, as the act of an ordinarily prudent person, immediately before placing himself in a position of danger to look in the direction from which danger is to be anticipated, and that this duty is not met by looking once and then turning away, but he must continue to be alert to safeguard himself against injury. Likewise the law is settled that, if the pedestrian fails to meet this standard of care and as a proximate cause thereof injury results to him, he as a matter of law is contributorily negligent.

In Gibb v. Cleave, 1936, 12 Cal.App.2d 468, at page 471, 55 P.2d 938, 939, Mr. Presiding Justice Nourse says: "The whole issue is one which has been decided again and again; that a pedestrian does not exercise reasonable care by taking just one look before placing himself in the midst of on-coming traffic upon a public highway. In Moss v. Boynton Co., 44 Cal.App. 474, 476, 186 P. 631, we said: 'It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty, and was not met by looking once and then looking away.*' [Italics added.] The statement was based on the holding in Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493, and has been followed without disagreement in the subsequent cases. Wright v. Foreman, 86 Cal.App. 595, 604, 261 P. 481; Bullock v. Western Wholesale Drug Co., 91 Cal.App. 369, 372, 266 P. 978; Wing v. Kishi, 92 Cal.App. 495, 499, 268 P. 483; Chase v. Thomas, 7 Cal.App.2d 440, 444, 46 P.2d 200; Deike v. East Bay Street Railways, Ltd., 7 Cal.App.2d 544, 550, 46 P.2d 812; Finkle v. Tait, 55 Cal.App. 425, 432, 203 P. 1031; Horton v. Stoll, 3 Cal.App.2d 687, 690, 40 P.2d 603; Koeppel v. Daluiso, 118 Cal.App. 442, 448, 5 P.2d 457. The rule of these cases has often been misunderstood and misquoted. In the last case we have found on the subject it is correctly said that it 'does not mean that it is a duty to look one way and continue to so look, but rather to look in the direction or directions of anticipated danger, and to continue to be alert to safeguard against injury.' Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518."

Upon a singularly similar set of facts, this court in the case of Flores v. Los Angeles Railway Corp., 1936, 15 Cal.App.2d 576, 59 P.2d 856, held the plaintiff contributorily negligent and affirmed a judgment predicated upon the granting of a motion for a directed verdict in favor of defendant. At page 579 of 15 Cal.App.2d, at page 857 of 59 P.2d, Mr. Justice White says: "A review of the evidence in this case, including the testimony of appellant Lupe Flores herself, convinces us that reasonable men could draw only one conclusion from that evidence, namely, an inference pointing unerringly to the fact that, had plaintiff used ordinary care for her own safety and looked *at any time* after leaving the curb until she arrived at the street car track, the accident would have been prevented and she would not have been injured. Grandy v. Southern Pacific Co., 9 Cal.App.2d 441, 443, 49 P.2d 1127. The testimony here shows beyond question that appellant Lupe Flores was negligent in stepping up to the tracks of respondent company directly in front of an oncoming street car which was plainly in view at the time she came up to the track, if she had chosen to glance in its direction. In Moss v. Boynton Co., 44 Cal. App. 474, 476, 186 P. 631, it was said: 'It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty, and was not met by looking once and then looking away.*' [Italics added.] This statement was based on the holding in Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493, and has been followed without disagreement in subsequent cases. [Citing cases.] This, of course, does not mean that it is a duty to look one way and to continue so to look, but rather to look in the direction or directions of anticipated danger, *and to continue to be alert to safeguard against injury.* [Italics added.] Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518."

In Morris v. Purity Sausage Co., 1934, 2 Cal.App.2d 536, at page 542, 38 P.2d 193, 196, the court says: "The court instructed that a pedestrian who attempts to cross a street at other than a regular crossing place must exercise greater precautions than at an established crossing, and 'that the observance of due care under such circumstances is not fulfilled by merely looking to the left and right as he steps upon the street; *he must exercise that care during all the time that he was crossing.*' [Italics added.] Plaintiff objects to this instruction on the ground that it requires a pedestrian while crossing to look in all directions at all times. The instruction merely required due care in view of the increased hazard during all the time that the increased hazard continued, and correctly stated the rule in this regard. [Citing cases.] Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631, is not a decision to the contrary."

In Deike v. East Bay Street Rys., Ltd., 1935, 7 Cal.App.2d 544, at page 550, 46 P.2d 812, 815, the court says:

"In Moss v. H. R. Boynton Co., 44 Cal. App. 474, 476, 186 P. 631, it is said: 'It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty, and was not met by looking once and then looking away.* [Italics added.] In the exercise of ordinary care it is the duty of a pedestrian "to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction."' * * *

"In the light of these decisions, it appears in the case at bar without conflict or contradiction that when plaintiff left the place of safety on the sidewalk and started diagonally across the street car tracks on East Eighteenth street, he looked over his shoulder to the east, a point from which cars were to be expected, and, seeing no street car, he traveled approximately 90 feet without again looking for approaching cars, and did not see the car until it was practically in collision with him. Had he used ordinary care or caution, he would have looked for approaching cars during his walk across the right of way and thus would have at least seen the light on the car and have avoided the accident. He said that it was a dangerous crossing; that it was dark and he could see only from the point where he started to cross the street to the corner of Fourth avenue (a distance of about one hundred two feet). With a knowledge of all of these facts, his conduct amounted to contributory negligence as a matter of law, which negligence proximately contributed to the accident."

In Bullock v. Western Wholesale Drug Co., 1928, 91 Cal.App. 369, at page 372, 266 P. 978, 979, the court says: "Respondents, among other authorities, cite Gary South Coast Agency v. Pacific Elec. Ry. Co., 56 Cal.App. 469, 472, 205 P. 883, Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031, and Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631, in which case the court says: 'It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty and was not met by looking once and then looking away.*'" (Italics added.)

In Wing v. Kishi, 1928, 92 Cal.App. 495, at page 498, 268 P. 483, 485, it is said: "It was the duty of the deceased, as the act of an ordinary prudent person, immediately before placing himself in a position of danger to look in the direction from which danger was to be anticipated. *This was a continuing duty, and would not have been met by looking once and then looking away.* [Italics added.] In the exercise of ordinary care, it was the duty of deceased, as well as it is the duty of every pedestrian, 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril, coming from either direction.' Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Moss v. H. R. Boynton Co., supra; Straten v. Spencer, 52 Cal.App. 98, 197 P. 540; Davis v. Breuner Co., 167 Cal. 683, 140 P. 586; Lord v. Stacy, 68 Cal.App. 517, 229 P. 874."

In Ogden v. Lee, 1923, 61 Cal.App. 493, at page 496, 215 P. 122, 123, in affirming a judgment predicated upon the granting of defendant's motion for a nonsuit upon the ground that plaintiff was contributorily negligent, the court says: "In the case of Moss v. Boynton Co., 44 Cal.App. 474, 186 P. 631, the rule is stated as follows: 'It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty, and was not met by looking once and then looking away.* [Italics added.] In the exercise of ordinary care it is the duty of a pedestrian 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction.' Sheldon v. James, 175 Cal. 474, 479, [166 P. 8, 2 A.L.R. 1493.]' Measuring the facts of this case by the rule thus stated, the plaintiff was guilty of contributory negligence. Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031; Chrissinger v. Southern Pac. Co., 169 Cal. 619, 149 P. 175."

In Moss v. H. R. Boynton Co., 1919, 44 Cal.App. 474, at page 476, 186 P. 631, 632, in affirming a judgment based upon the granting of defendant's motion for a nonsuit upon the ground that plaintiff was contributorily negligent, the court says: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. *This was a continuing duty, and was not met by looking once and then looking away.* [Italics added.] In the exercise of ordinary care it is the duty of a pedestrian 'to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction."

In Sheldon v. James, 1917, 175 Cal. 474, at page 479, 166 P. 8, 10, 2 A.L.R. 1493, in holding that plaintiff was guilty of contributory negligence as a matter of law in not continuing to look to the right and left after having stepped into a street he was about to cross, Mr. Justice Henshaw says: "The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. *The observance of that care is imperative upon him during all of the time that he is crossing.* [Italics added.] Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 P. 677."

It is to be noted that our Supreme Court denied applications for hearing in Gibb v. Cleave, supra, Flores v. Los Angeles Ry. Co., supra, and Ogden v. Lee, supra. The only California decision which I have found which might indicate a contrary rule is Salomon v. Meyer, 1934, 1 Cal.2d 11, 32 P.2d 631, which case is distinguishable on its facts from the other cases above cited, in that the testimony showed that plaintiff saw the automobile being driven by defendant and misjudged the speed at which it was traveling. In any event, the decision in that case has apparently not been relied upon in any subsequent case, nor has it been extended beyond facts which are identical therewith; and it is of course prior to the Supreme Court's denial of applications for hearing in Gibb v. Cleave, 1936, and Flores v. Los Angeles Ry. Corp., 1936, supra. If the majority opinion in this case is to prevail, the court is expressly overruling the decisions above cited and is establishing a new rule of law in this state.

I believe in the doctrine of stare decisis, that is, that the law is a science, the leading principles of which are settled and should not be open for discussion upon elevation to the bench of every new judge, however subtle his intellect, profound his learning, logical his reasoning, or acute his sense of justice. Upon the certainty of rules of law citizens enter into contracts, purchase property, and otherwise plan their course of action. Law is founded upon reason, but this means the reasoning which is the result of the general intelligence, learning, and experience of mankind over a protracted period of time and not of the individual reasoning of one or of several judges. 15 C.J. (1918), p. 916, § 304.

I am also of the opinion that the rule of law which has obtained in this state for twenty years (Sheldon v. James, supra), requiring a pedestrian to make reasonable use of his eyes and ears to avoid being injured when crossing a public thoroughfare is a sound and beneficial principle of law. I therefore cannot join in the opinion of my learned associates, in view of the conceded facts of the instant case that plaintiff did not look to his right or left at any time after leaving the curb and proceeding in a southerly direction on Broadway across Ninth street, since if he had looked *at any time* after stepping into the street he would have seen the automobile driven by defendant Unger and would have avoided being injured.

In my view of the law and the facts of this case, the order from which an appeal has been taken should be reversed.

PEOPLE v. WRIGHT.*

Cr. 1601.

District Court of Appeal, Third District, California.

April 7, 1938.

Rehearing Granted April 22, 1938.

1. Prostitution 🔑3

An information alleging that the defendant willfully, unlawfully, and feloniously procured for a named female person a place as an inmate of a house of prostitution was sufficient to charge pandering. St. 1911, p. 9.

2. Prostitution 🔑1

The crime of "pandering" is sufficiently established by proof of conduct of defendant which assisted, induced, persuaded, or encouraged a female to become an inmate of a house of ill fame for the purpose of practicing prostitution. St.1911, p. 9.

[Ed. Note.—For other definitions of "Pander," see Words & Phrases.]

3. Prostitution 🔑4

Evidence *held* to justify conviction for pandering. St.1911, p. 9.

4. Criminal law 🔑531(3)

In prosecution for pandering, statement of defendant which was taken by court reporter under direction of district attorney was properly admitted where court reporter testified that statement was voluntarily given without promise of reward or threat of punishment. St.1911, p. 9.

5. Criminal law 🔑412(2), 516

In prosecution for pandering, proof of the voluntary nature of a statement of defendant which was taken by a court reporter under the direction of the district attorney was not a necessary prerequisite to the admission of the statement in evidence where the statement consisted of a mere series of declarations regarding the circumstances of the transaction and hence did not constitute a "confession." St.1911, p. 9.

[Ed. Note.—For other definitions of "Confess; Confession," see Words & Phrases.]

6. Prostitution 🔑5

In prosecution for pandering, whether female was procured by defendant to become inmate of defendant's house of ill fame for purpose of practicing prostitution or merely to work therein as domestic servant was for jury. St.1911, p. 9.

7. Prostitution 🔑1

The term "inmate" within the statute providing for the punishment of pandering means that female must become an inmate in house of ill fame for purpose of engaging in prostitution. St.1911, p. 9.

[Ed. Note.—For other definitions of "Inmate," see Words & Phrases.]

8. Criminal law 🔑414

In prosecution for pandering, a statement of the defendant was not required to be discredited because it was taken by the district attorney before the defendant had an opportunity to talk with her attorney. St.1911, p. 9.

9. Criminal law 🔑743

In prosecution for pandering, determination whether defendant told the truth in a statement made before she had an opportunity to talk with her attorney, or in contradictory statements made as witness at trial, was for jury. St.1911, p. 9.

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*Rehearing granted 79 P.2d 102.

10. Prostitution 🔑4

In prosecution for pandering, permitting the prosecutrix to tell the jury her age was not error, since under the statute it is unlawful to procure a female to become an inmate of a house of prostitution regardless of her age. St.1911, p. 9.

11. Criminal law 🔑1169(12)
Prostitution 🔑1

In prosecution for pandering, striking from record and instructing jury to disregard answer given by prosecuting witness on cross-examination in reply to question whether she was doing what her husband told her to do was harmless, notwithstanding that answer might have been left in record where evidence was cumulative and other evidence showed conclusively that defendant at least encouraged and abetted prosecuting witness to become inmate of house of prostitution, since under statute, regardless of influence of husband of prosecuting witness, defendant was guilty as principal in the transaction. St.1911, p. 9.

12. Criminal law 🔑1170(1)

In prosecution for pandering, sustaining objection to question asked prosecuting witness by defendant's attorney whether she was doing what her husband had told her to do was not reversible error in view of evidence which conclusively showed that defendant at least encouraged and abetted prosecuting witness to become inmate of house of prostitution and hence was guilty as principal in transaction. St.1911, p. 9.

13. Witnesses 🔑323

In prosecution for pandering, overruling objection of defendant to an impeaching question propounded to a witness who was called by prosecution was not error where witness was clearly adverse and unreliable. St.1911, p. 9; Code Civ.Proc. § 2049.

14. Witnesses 🔑380(5)

A party who is taken by surprise in the testimony of a witness produced by him may be permitted to impeach the witness by proof of inconsistent statements which were made by the witness at another time and place. Code Civ.Proc. § 2049.

15. Prostitution 🔑5

In prosecution for pandering, an instruction that the offense of pandering may be accomplished even though the accused person may procure a female to become an inmate of a house of prostitution by means of negotiations through a third person was not error. St.1911, p. 9.

16. Criminal law 🔑62

A person may persuade, encourage, or procure another to perform a criminal act notwithstanding that negotiations therefor are conducted through an agent or representative.

17. Prostitution 🔑1

The statute providing for punishment of crime of "pandering" is violated by procuring a female to become an inmate of a house of ill fame to practice prostitution therein. St.1911, p. 9.

18. Prostitution 🔑5

In prosecution for pandering, instruction that "pandering" consists of unlawfully procuring female to engage in gratifying the lust of other individuals was properly given. St.1911, p. 9.

19. Criminal law 🔑1172(7)

In prosecution for pandering, defendant was not entitled to complain on appeal of the giving of an instruction that pandering consists of unlawfully procuring a female to engage in gratifying the lust of other individuals, where jury was told that it must acquit defendant unless she procured prosecuting witness to become inmate of house of ill fame with intention of encouraging her to practice prostitution therein, and there was evidence that defendant procured prosecuting witness to practice prostitution in her house, since instruction was more favorable to defendant than she was entitled to. St. 1911, p. 9.

20. Criminal law 🔑829(20)

The refusal to give two instructions offered by defense regarding subject of aiding and abetting commission of crime was not error where the subject was adequately covered by another instruction.

21. Criminal law 🔑829(1)

The refusal to give instructions which contained no essential element of crime which was not covered by other instructions was not prejudicial error, where court fully and fairly instructed jury on every necessary element of crime and from entire record it was apparent that verdict and judgment did not constitute miscarriage of justice.

22. Criminal law ⇨1167(4)

In prosecution for pandering, permitting the filing of a second amended information on the morning of the first day of the trial after the jury was impaneled was not prejudicial where the amended information merely changed the language of the second and fourth counts thereof with respect to charges of conspiracy which counts were dismissed on motion of defendant at close of prosecution's evidence, and the jury convicted the defendant only on the first count which was not changed by the amendment in question. St.1911, p. 9; Pen.Code, § 1008.

23. Indictment and Information ⇨161(3)

At any stage of the proceedings in a criminal case, the court may authorize an amendment of the information to supply any defect or insufficiency thereof, where the amendment does not result in charging an offense which was not disclosed by the evidence adduced at the preliminary examination, and the substantial rights of the defendant are not thereby prejudiced. Pen. Code, § 1008.

24. Criminal law ⇨1044, 1119(2)

In prosecution for pandering, submission of the case to the jury after two conspiracy counts of the indictment had been dismissed, without striking from record all the evidence regarding conspiracy was not prejudicial error where the defendant failed to move to strike out such evidence or to direct the court's attention to prejudicial evidence and trial court instructed jury to disregard evidence of conspiracy, and especially where no prejudicial evidence was pointed out on appeal but all challenged evidence to which attention of reviewing court was directed appeared to be competent. St.1911, p. 9.

25. Criminal law ⇨814(2)

In prosecution for pandering, wherein charges of conspiracy were dismissed at close of prosecution's case, the refusal to give an instruction regarding the alleged absence of evidence with respect to conspiracy was not error. St.1911, p. 9.

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Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Louise Wright was convicted of pandering, and she appeals.

Affirmed.

Lawrence Edwards, and Charles H. Epperson, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted under the first count of an information charging her with pandering, contrary to the provisions of the statutes. St.1911, p. 9; 1 Deering's Gen.Laws of 1931, p. 819, Act 1906. The information alleges that the defendant did "wilfully, unlawfully and feloniously procure for a female person, to wit: one Esther Stephens Blanas, a place as an inmate of a house of prostitution."

The appellant contends that the verdict and judgment of commitment are not supported by the evidence, that the court erred in receiving and rejecting testimony, and in giving to the jury and refusing certain instructions. It is also inferred the first count of the information upon which the defendant was convicted fails to state facts sufficient to constitute a public offense.

[1, 2] The information states a good cause of action for the crime of pandering. People v. Cimar, 127 Cal.App. 9, 15 P.2d 166, 167, 16 P.2d 139. It alleges that the defendant procured Esther Blanas to become an inmate of a house of prostitution. Under the statute above referred to, pandering may be accomplished in several different ways. It is said in the Cimar Case, supra, that "if the conduct of the defendant assisted, induced, persuaded, or encouraged the female to become an inmate of the house of ill fame for the purpose of practicing prostitution, the crime of pandering is sufficiently established." The first count of the information is couched in the language of the statute and states a good cause of action.

[3-5] The judgment and verdict are adequately supported by the evidence. We have carefully read the entire transcript of evidence, and find that every necessary element constituting the crime of pandering as alleged in the information is sufficiently supported by competent evidence. A statement of the defendant, which was taken by the court reporter under the direction of the district attorney, was properly received in evidence. The court reporter testified that it was voluntarily given without promise of reward or threat of punishment. Proof of the voluntary nature of the statement was not a

necessary prerequisite to its admission in evidence, since it does not constitute a confession of the defendant, but rather consists of a mere series of declarations regarding the circumstances of the transaction. 8 Cal.Jur. 98, §§ 194, 195. The defendant admitted that she operated a house of prostitution at number 130 West Lafayette street in Stockton, to which Esther Blanas was taken as an inmate; that the defendant accompanied Gus Blanas to Sacramento in his automobile to look the girl over and see whether she would be suitable to take into the house of ill fame "to work." Blanas had just been released from prison and was trying to avoid the officers. He told the defendant he had just married Esther at Reno. He was insisting that she should practice prostitution to earn money for them to take a desired trip to the East. The defendant met the girl and told Gus "it would be all right" to bring her to the house.

It is true that the defendant talked with Gus Blanas and with her stepmother, Mabel Massmedsu, who was actively managing the business, regarding the admission of the girl to her house. It may be true that the plan of persuading Esther to become an inmate of the house originated with Gus Blanas, and that it was approved by Mabel, but it was the defendant's business. She actively participated in procuring the girl to become an inmate of her house of ill fame. She helped to train the girl for the duties she was to perform, and she took from her one-half of all the money she earned from practicing prostitution. There is no doubt the defendant procured Esther to become an inmate of her house of ill fame for the purpose of profiting from her practice of prostitution therein. Certainly the defendant "encouraged" the girl to become an inmate of her house and to practice prostitution there.

[6, 7] There is no merit in the appellant's contention that the evidence merely shows that Esther was induced to become an inmate of the house "to work" therein as a domestic servant, only. It is true that the defendant admitted she went to Sacramento to meet the girl to determine whether she would be suitable "to work" in the house of prostitution. The evidence is undisputed that she became an inmate of the house and that she practiced prostitution therein. There is no evidence that she ever performed any other kind of work in that house. Reading the statement of the defendant which was received in evidence, one is impressed with the fact that the only purpose on the part of the defendant in inducing the girl to enter the house was to profit from her practice of prostitution at that place. At least that is a reasonable inference to be drawn from the evidence. It was the sole province of the jury to determine from all of the evidence adduced at the trial whether Esther was procured by the defendant to become an inmate of her house of ill fame for the purpose of practicing prostitution or merely to work there as a domestic servant. The court correctly instructed the jury that the gist of the crime prohibited by the statute in question was to prevent pandering, and that the term "inmate," as it is used in the statute, means that the female must become an inmate in the house for the purpose of engaging in prostitution. It follows that the verdict of guilty which was returned by the jury necessarily implies that it determined that the defendant procured the girl to become an inmate of her house for the purpose of inducing her to practice prostitution therein, and not to work there as a mere domestic servant.

[8, 9] It is contended the statement of the defendant should be discredited because it was taken by the district attorney before she had an opportunity to talk with an attorney. It is true that she contradicted many of the important and incriminating admissions of that statement when she became a witness at the trial. The jury was warranted in assuming, as it evidently did, that the defendant was better qualified to tell the truth before she talked with an attorney than she was afterward. At least it was the sole province of the jury to determine upon which of those occasions she did tell the truth.

[10] There was no error in permitting the prosecutrix to tell the jury her age. It matters not what the age of a female may be who is procured to become an inmate of a house of prostitution. Under the statute, it is unlawful to procure a female to become an inmate of such a house regardless of her age. The question was harmless.

[11] It was not error for the court to strike certain evidence from the record and to instruct the jury to disregard an answer given by the prosecuting witness in reply to a leading and suggestive question propounded on cross-examination by the defense, as follows:

"As a matter of fact * * * you were doing just what Gus told you [to do] * * *? A. Yes."

This question and answer might properly have been left in the record as tending to show whether the defendant procured or encouraged her to become an inmate of the house. But the evidence was cumulative, and, under the statute, even if she did enter the house in accordance with her husband's desire, the evidence conclusively shows that the defendant at least encouraged and abetted her conduct in that respect. Regardless of the influence of her husband, the defendant was still guilty as a principal in the transaction. The ruling was harmless. It was not reversible error.

[12] For the same reason it was not reversible error for the court to have subsequently sustained an objection to a similar question propounded to the same witness by the attorney for the defendant.

[13,14] It was not error for the court to overrule an objection of the defendant to an impeaching question propounded to an adverse witness, Mabel Massmedsu, who was called by the prosecution. The witness was clearly adverse and unreliable. In overruling the objection, the court said, "Apparently he [the District Attorney] is surprised at her testimony." It is a principle too well established to require citations, that a party who is taken by surprise in the testimony of a witness produced by him may be permitted to impeach the witness by proof of inconsistent statements which were made by him at another time and place. Section 2049, Code Civ. Proc.

[15, 16] It was not error to instruct the jury that the offense of pandering may be accomplished even though the accused person may procure the female to become an inmate of a house of prostitution by means of negotiations therefor through a third person. People v. Torres, 193 Cal. 730, 227 P. 177. This instruction was properly given. One may persuade, encourage, or procure another to perform a criminal act even though the negotiations therefor are conducted through an agent or representative. While the evidence shows that the defendant personally went to Sacramento to see Esther and consented to her becoming an inmate in her house of ill fame and instructed her in her nefarious trade, it also shows that defendant talked about the subject with Gus Blanas and with her manager of the business, Mabel Massmedsu. It may reasonably be said her negotiations to admit the girl to her house were partly conducted through those individuals, but that fact rendered the defendant none the less guilty as a principal in the crime.

[17-19] The jury was instructed that "pandering consists of unlawfully procuring a female to engage in gratifying the lust of other individuals." The jury was then told it must acquit the defendant unless it appeared that she procured Esther Blanas to become an inmate of her house of ill fame with the intention of encouraging and enticing her to practice prostitution therein. Assuming that the statute is violated only by procuring a female to become an inmate of a house of ill fame to practice prostitution therein, which we believe is the spirit of the law, the challenged instruction was properly given to the jury. If that is not the correct construction of the statute, then the instruction was more favorable to the defendant than she was entitled to have given, and she may therefore not complain of that fact. The jury was plainly told that the defendant could not be convicted unless it appeared that she had procured the girl to become an inmate of her house of ill fame with the intention of inducing or encouraging her to practice prostitution therein. There is no doubt that the girl did practice prostitution in that house; that the defendant instructed her in that regard; and that she appropriated one-half of the money the girl earned in that manner. There is therefore evidence that she procured her for that purpose.

[20] It did not constitute error for the court to refuse to give two instructions offered by the defense regarding the subject of aiding and abetting the commission of a crime. That subject was adequately covered by another instruction which was given to the jury.

[21] Nor was it prejudicial error to refuse to give the other instructions offered by the defense, which refusal is complained of. They contain no essential element of the crime which is not covered by other instructions which were given in the court's charge. The court very fully and fairly instructed the jury on every necessary element of the crime with which the defendant was charged. Moreover, from a careful reading of the entire record it is apparent that the verdict and judgment

which were rendered in this case do not constitute a miscarriage of justice. On the merits of the case, without doubt, the defendant was properly convicted.

[22, 23] The defendant was not prejudiced by the filing of a second amended information on the morning of the first day of trial, after the jury was impaneled, which merely changed the language of the second and fourth counts thereof, with respect to separate charges of conspiracy to commit the offense of pandering. By leave of court the second amended information was filed after the jury had been impaneled and before any evidence was adduced. It does not appear the defendant objected to filing that amended pleading. The amended information did not change the language of the first count, which is the only charge of which she was convicted. At the close of the prosecution's evidence, upon motion of the defendant, the second and fourth counts of the information, which were the only ones changed in any manner by the challenged amendment, were dismissed. In its charge to the jury, the court specifically directed it as follows:

"You are instructed that the court has dismissed counts 2 and 4 of the information on file against the defendant charging conspiracy to commit the crime of pandering, and you are, therefore, to disregard and give no consideration to said counts 2 and 4 charging conspiracy to commit the crime of pandering."

The jury acquitted the defendant of count 3 of the information. She was convicted of count 1, only. That count was not changed by the amendment in question. The defendant was therefore not prejudiced by the amendment. At any stage of the proceedings in a criminal case the court may authorize an amendment of an information to be filed to supply any defect or insufficiency thereof, which does not result in charging an offense which is not disclosed by the evidence adduced at the preliminary examination, and when the substantial rights of the defendant are not thereby prejudiced. Section 1008, Pen. Code; 14 Cal.Jur. 91, §§ 68, 69; People v. Milligan, 77 Cal.App. 745, 247 P. 580. In the case last cited an amendment of the information was filed by leave of court, over the objection of the defendant, after the evidence was completely closed. We are unable to perceive how the defendant could possibly be prejudiced by the amendment which was filed, under the circumstances of this case.

[24] It is contended that it constitutes prejudicial error for the court to have permitted the case to go to the jury after the two counts of the indictment with respect to the charges of conspiracy had been dismissed, without striking from the record all the evidence regarding conspiracy. That procedure was not erroneous or prejudicial. There was no motion on the part of the defendant to strike out any such evidence. The court was directed to no such alleged prejudicial evidence. We are not now pointed to any evidence in the record which appears to be incompetent or prejudicial. All of the challenged evidence to which our attention is now directed appears to be competent as tending to show the intent and purpose of the defendant to have procured Esther Blanas to become an inmate of her house of ill fame for the purpose of unlawfully practicing prostitution therein. If there are circumstances which do not tend to prove those essential facts, they are trivial and harmless. Moreover, the court specifically instructed the jury, as we have previously stated, that it should not consider such evidence of conspiracy, and on the contrary that it should disregard entirely the charges of conspiracy.

[25] For the reasons heretofore assigned, it was not error for the court to refuse to give to the jury the instruction regarding the alleged absence of evidence with respect to conspiracy.

The judgment is affirmed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

25 Cal.App.2d 663

MAXFIELD, WILTON & ASSOCIATES, Inc., v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 11650.

District Court of Appeal, Second District, Division 1, California.

April 11, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Workmen's compensation ⚿=1951

An opinion of the District Court of Appeal on petition for writ of review of award of Industrial Accident Commission, reciting that under the evidence insurer was liable under compensation policy from date of delivery, by virtue of giving credit for initial premium, was "law of the case" on subsequent hearing by the commission, wherein evidence was substantially the same as was elicited at original hearing.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Workmen's compensation ⚿=1951

Where District Court of Appeal annulled order of Industrial Accident Commission that compensation insurer was not liable to employer on policy, on ground that evidence showed unconditional delivery of policy and extension of credit for initial premium, and returned the case to the commission "for further proceedings not inconsistent with this opinion," commission's order again freeing insurer from liability was erroneous where evidence adduced at subsequent hearing was the same in substance and effect as was elicited at original hearing.

Proceeding by Maxfield, Wilton & Associates, Inc., to annul an award of the Industrial Accident Commission, and to have liability for injuries sustained by John F. Willis, employee, imposed on the Colonial Mutual Compensation Insurance Company, Limited. The order of the commission was annulled, 65 P.2d 1354, and the matter was returned for further proceedings. To review a second award which was substantially the same as the original award, the employer brings petition for review.

Award annulled and proceedings returned for disposition.

A. P. G. Steffes, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, and Walter L. Bowers and W. Wallace Trau, both of Los Angeles, for respondent.

DORAN, Justice.

This is a petition for review of the second award of the respondent Industrial Accident Commission.

The facts are, in brief, as follows: One John F. Willis, while employed on December 27, 1935, as a painter and paperhanger on a salary basis, by Maxfield, Wilton & Associates, Inc., who were in the property management business, sustained injuries occurring in the course of and arising out of his employment.

The insurance carrier, when informed of the accident, denied liability, claiming that the work done by said employee "was not within the classification covered by the policy."

An application was filed with respondent commission, by the injured employee, for compensation against the petitioner herein as the employer, and against the Colonial Mutual Compensation Insurance Company, Limited, as the carrier. After a hearing, the commission made its findings and award, fixing the compensation recoverable, and holding that the petitioner was not insured and that the insurance company was not the carrier, freeing the latter from any liability.

By a judgment of the District Court of Appeal, Second Appellate District, Division 2, upon a petition for a writ of review, the order of the commission was annulled and the matter was returned to respondent commission for further proceedings not inconsistent with the opinion of said court. 19 Cal.App.2d 606, 65 P.2d 1354. A petition for hearing was filed by the carrier in the Supreme Court, which was denied. Thereafter, the commission conducted a hearing, received further evidence, and made its award, which was substantially the same as the award originally made by said commission.

Petitioner herein seeks an annulment of the second award of respondent commission, contending, with reference to the additional testimony which was taken on rehearing, "That none of said testimony was new or different in substance from that introduced at the former hearing before respondent and that the condition of the record after the introduction of such further evidence was not different from the condition of the record as it existed at the time the previous and original award was annulled."

After the decision of the Appellate Court became final, the commission, as heretofore mentioned, proceeded to re-examine the issue as to the understanding which was had between the agent of the insurance company and petitioner's employee in charge of escrows and insurance, at the time the policy in question was being secured. At the first hearing before the commission the agent of the insurance company testified that: "He (petitioner's employee) said to write the policy with the classification mentioned only—with general maintenance of apartments and also covering the office help of Maxfield, Wilton and mail it to him *for his inspection.*" Italics added. At the second hearing, upon the additional evidence of which respondent commission relies to support its second award, the agent of the insurance carrier testified that: "Mr. Wright (petitioner's employee) said to send the policy to him and which he would review, and *if it suited his purpose,* he would pay for it. * * * He said to send the policy over for his approval. We do not discuss the payment of the policy; he was discussing whether the policy would meet his approval or not. Q. Was there anything said then about payment of the premium on the policy? A. No." Italics added.

The opinion of the Appellate Court, following the first hearing, is in part as follows: "Bearing these rules in mind, we are forced to the conclusion that petitioner was protected by the policy. It was doubtless the intention of the parties to insure petitioner's employees for one year beginning December 24, 1935. It was expressly so stated in the policy, and it is unreasonable to argue that the parties intended to leave a period of ten days in which petitioner was not covered by insurance. An uncertainty arises from the language in the policy in which payment of the premium is made 'a condition precedent.' By executing and delivering the policy to petitioner containing a provision permitting payment of the premium any time within the succeeding ten days, the carrier extended credit for the amount of the premium during that period. The payment of the premium on or before January 3d was a condition precedent to a continuation of the risk assumed by the carrier. If the hearing had been conducted by the commission on the day following the accident, it could not have been successfully contended that the policy was not then in force. Failure to pay the premium thereafter did not efface the liability which had been incurred." Maxfield, Wilton & Associates, Inc., v. Industrial Accident Commission, 19 Cal.App.2d 606, 65 P.2d 1354, 1355.

[1] The above-mentioned opinion of the District Court of Appeal is the law of the case, which decision holds that "petitioner was protected by the policy." Respondent's effort to avoid the judgment is unavailing, for it is evident, from a review of the record, that the so-called "additional evidence" produced at the second hearing is, in substance and effect, the same as that elicited at the former hearing and hence is merely cumulative.

As contended by respondent, there can be no question as to the power of the commission to conduct a further hearing in proper cases, of which the second hearing of the case at bar is an example. Nor can there be any question as to the power of the commission, after taking further and additional evidence, to decide again in the same form and effect as before. But such power in the commission manifestly is based upon the proposition that the so-called further and additional testimony and evidence is, in fact and in law, what it purports to be, that is to say, actually additional and not merely a review in form only that produces nothing new in substance. The record of the appeal herein reveals a condition that is no different now than when presented to the District Court of Appeal on the first petition.

[2] It follows, therefore, that the action of the Industrial Accident Commission freeing the insurance company from liability and purporting to be based on further and additional evidence does not conform to or comply with the judgment and order of the District Court of Appeal, which judgment and order recited that, "the matter is returned to the Industrial Accident Commission for further proceedings *not inconsistent with this opinion.*" Italics added. That opinion, as heretofore noted, pointed out that "failure to pay the premium thereafter did not efface the liability which had been incurred" and that "petitioner was protected by the policy."

For the foregoing reasons, the award is annulled and the proceedings returned to the Industrial Accident Commission for disposition in accord with the judgment and order of the District Court of Appeal, Second Appellate District, above mentioned, as well as with the conclusions reached herein.

We concur: YORK, P. J.; WHITE, J.

25 Cal.App.2d 567

CHAPMAN et al. v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 5999.

District Court of Appeal, Third District, California.

April 1, 1938.

As Modified June 8, 1938.

1. Corporations 🔑661(1, 3)

A foreign corporation was not barred from defending quiet title action and having title quieted in it, by failure to file copy of its articles with clerk of county where land was located, in absence of showing that it had not filed copy of articles with Secretary of State, or that it had engaged in business within the state further than by consummating single transaction involved in the suit. Civ.Code, §§ 278, 293, 405, 408.

2. Statutes 🔑225

The statute requiring "corporations" to file copy of their articles with clerk of each county wherein they possess realty must be construed with statute restricting meaning of "corporation" to domestic corporations, as inapplicable to foreign corporations, notwithstanding constitutional definition of corporations. Civ.Code, §§ 278, 293; Const. art. 12, § 4.

[Ed. Note.—For other definitions of "Corporation," see Words & Phrases.]

3. Appeal and error 🔑840(3)

The reviewing court would not determine whether construction of statute requiring corporation to file copy of its articles with clerk of county in which it owns realty, as inapplicable to foreign corporations, violated constitutional provision against permitting foreign corporations to transact business on more favorable conditions than domestic corporations, in absence of evidence that foreign corporation involved in the case under review had transacted business within the state. Civ.Code § 293; Const. art. 12, § 15.

4. Insurance 🔑16

A foreign insurer's purchase of note and trust deed did not constitute "transacting business" within constitutional provision against permitting foreign corporation to transact business on more favorable conditions than prescribed for domestic corporations. Const. art. 12, § 15.

[Ed. Note.—For other definitions of "Transacting Business," see Words & Phrases.]

5. Corporations 🔑672(5)

In quiet title action against foreign corporation, plaintiffs waived their right to urge corporation's failure to file its articles with clerk of county wherein realty was situated, as bar to corporation's defense and claim of title, by failing to plead such failure as a defense.

6. Names 🔑18

Evidence indicating that owner of land executed deed to his daughter, whose name was same as maiden name of owner's sister, negotiated mortgage loan in daughter's name, and got benefit of loan, with purpose of defrauding mortgagee by claiming that title was really in sister, established validity of foreclosure title of assignee of mortgage executed by daughter, as against sister and holder of trust deed from sister.

7. Quieting title 🔑10(1)

Persons claiming title to land as against holder of mortgage foreclosure title, under purported junior incumbrance, must recover on the strength of their own title.

8. Names 🔑10

Where owner of land intending to obtain loan thereon executed deed to his daughter, furnished daughter with indicia of ownership, and got benefit of loan, parties to the transaction were estopped from denying validity of note and trust deed executed by daughter as owner, irrespective of whether intention was to actually convey title or to use daughter's name as a fictitious name.

9. Names 🔑10

The name of a grantee of property will be deemed to be fictitious, even if it is the name of a living person, if name is assumed for fraudulent purpose.

10. Judgment ⚿707

A judgment adjudicating record ownership of land in consolidated mechanics' lien foreclosure suits, to which mortgagee of land involved was not made a party, was not res judicata in subsequent quiet title action against mortgagee, to whom judgment had been assigned.

11. Appeal and error ⚿1170(7)

Error in admitting record of consolidated mechanics' lien foreclosure suits as evidence of ownership of property, in quiet title action against mortgagee of property that had not been a party to mechanics' lien suits, was harmless, where there was an abundance of other evidence of ownership and no miscarriage of justice resulted. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; F. M. Jamison and Ruben S. Schmidt, Judges.

Quiet title action by Arthur Chapman and Marion Scott, also known as Mrs. Marion Aitken, against the Title Guarantee & Trust Company and others. From a judgment quieting title in defendant Central Life Assurance Society, plaintiffs appeal.

Affirmed.

W. I. Gilbert, Jr., of Los Angeles, for appellants.

M. J. Rankin, Seth I. Colver, Milo V. Olson, Walter S. Home, Alvan M. Palmer, and Keogh, Cate & Colver, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment quieting title in the defendant, Central Life Assurance Society, to a portion of lot 7 of San Marino tract in Pasadena.

The complaint in this case was filed February 14, 1934, alleging that by the terms of a certain agreement the plaintiff, Arthur Chapman, acquired title to the land in question which he holds in trust for Marion Scott, the owner thereof, to secure the payment of obligations due from her to the grantee. It is further asserted the defendants wrongfully claim title to the land as the result of foreclosure proceedings of a purported deed of trust executed by Marion Scott to secure the payment of a promissory note dated March 2, 1929, for the sum of $6,500. The Title Guarantee & Trust Company is named in the deed as trustee, and the Mortgage Guarantee Company as beneficiary thereof. For a valuable consideration the note and trust deed were subsequently assigned and transferred to Central Life Assurance Society. But the complaint asserts that neither of those instruments was assigned nor executed by Marion Scott, and on the contrary that they were forged and invalid. It is also alleged the plaintiffs were not indebted to the defendants or any of them on account of said note, or at all; that the foreclosure proceedings were therefore void; and that none of the defendants had any right, title, or interest in the lot described. The complaint then asked that title to the property be quieted in the plaintiffs and that the defendants be enjoined from asserting any right thereto and from interfering with plaintiffs' possession thereof.

The defendant, Mortgage Guarantee Company, filed its disclaimer in the action. The Central Life Assurance Society, and the Title Guarantee & Trust Company filed separate answers denying that either the note or trust deed was forged or invalid, and asserting that the plaintiff Marion Scott held the record title to the land and represented that she was the owner thereof, upon which assurance she procured from the Mortgage Guarantee Company a loan of $6,500, and signed and executed the note in question March 2, 1929, payable in semiannual installments of $195, together with interest on all deferred payments at the rate of 6 per cent. per annum, with the privilege on the part of its holder to declare the entire note due upon default of any payment thereof; that she also at the same time signed and executed the deed of trust on the property in question to secure the payment of the promissory note; that the maker of the note defaulted in the payments of certain installments thereof, and upon demand, pursuant to the terms thereof, the trust deed was foreclosed to satisfy the unpaid balance of the note in the sum of $4,335.61, and the property was sold under the provisions of section 2924 of the Civil Code; that Central Life Assurance Society became the purchaser thereof March 30, 1934; that ever since the last-mentioned date said Central Life Assurance Society has been and now is the owner of the property and entitled to the possession thereof; that the plaintiff, Arthur Chapman, is not the owner of said property, and that he wrongfully withholds possession thereof from the Central Life Assurance Society; that if the said Chapman ever held a conveyance to said property, it was solely in trust for the benefit of O. N. Scott, the former owner thereof. These answering defendants then prayed that title to the property be quieted in the Central Life Assurance Society.

Upon trial the court found that prior to September 29, 1928, O. N. Scott and his wife, Belle W. Scott, owned the property in question; that on the last-mentioned date they fraudulently deeded the lot to Marion Scott, their daughter, for the purpose of defrauding the defendants; that on March 2, 1929, the plaintiffs conspired with O. N. Scott and his wife and with Edith Marion Scott Packard, the daughter of Mr. and Mrs. Scott, to fraudulently procure a loan of $6,500 from the Mortgage Guarantee Company to be used in constructing a dwelling house on said land, by representing that Marion Scott was the real owner thereof, when in truth O. N. Scott and his wife owned the property, and by executing the note for said sum of money secured by the trust deed on said property, and after thus securing the loan to then defraud the holder of the note and trust deed by repudiating her execution of those instruments and declaring them to be forged and void; that said scheme and plan was carried out in pursuance of said conspiracy, and the Mortgage Guarantee Company, believing that Marion Scott was the real owner of the land and possessed authority to execute a valid trust deed thereon to secure the loan, and relying upon those representations, deposited in a trust fund said sum of $6,500, and paid to the plaintiffs a considerable portion thereof; that on March 2, 1929, pursuant to said scheme and plan to defraud the Mortgage Guarantee Company, Marion Scott, the daughter of Mr. and Mrs. O. N. Scott, executed and delivered as her valid instruments the promissory note for $6,500 and her deed of trust to the property in question to secure the note, conditioned as above stated; that for a valuable consideration the note and trust deed were assigned and transferred to the Central Life Assurance Society, which then became the owner and holder thereof. The court determined that the note and trust deed were not forged or false, but on the contrary that they were both valid and binding as a lien against the land. The court further found that the Mortgage Guarantee Company actually paid, prior to September 10, 1929, on account of said loan the aggregate sum of $4,750 which was expended by the conspirators in constructing the dwelling house on said premises at which time default in the payments of certain installments which were due on the note occurred, and numerous mechanics' liens were filed against the property; that on October 23, 1933, the owner and holder of the note and trust deed served notice of default thereon, and upon demand the trust deed was foreclosed and on March 2, 1934, the property was sold under the provisions of section 2924 of the Civil Code, to Central Life Assurance Society, which thereby became and now is the owner of the land, and that neither Arthur Chapman nor Marion Scott has any right, title, or interest in the property. A judgment was accordingly rendered quieting title to the lot in Central Life Assurance Society.

The judgment originally awarded Central Life Assurance Society damages in the sum of $1,430 for unlawful detention of the property by plaintiffs. A new trial was granted with respect to that feature of the judgment. No appeal was taken from that order. The motion for new trial was denied with respect to that portion of the judgment which quiets title. From the judgment quieting title the plaintiffs have appealed.

The appellants contend that the findings and judgment are not supported by the evidence, particularly with respect to the issues regarding the alleged conspiracy and affecting the party entitled to the land in question, that the court erred in receiving in evidence the findings and judgment as res adjudicata in certain consolidated mechanics' lien cases involving the same property, and that Central Life Assurance Society was barred, under the provisions of section 408 of the Civil Code, from maintaining its defense to this action, for the reason that it is a foreign corporation engaged in intrastate business in California without having complied with the requirement of section 293 of the Civil Code, by filing in the office of the county clerk of Los Angeles county, where this land is situated, its articles of incorporation.

[1] The Central Life Assurance Society is not barred by statute from maintaining this suit. The court found that it is a foreign corporation. We are pointed to no evidence indicating that it had not fully complied with the provisions of section 405 of the Civil Code by filing with the secretary

of state a certified copy of its articles of incorporation. All that appears is that a copy of those articles was not filed in the office of the county clerk of Los Angeles county in accordance with the provisions of section 293 of the Civil Code.

[2] Section 293 of the Civil Code, requiring corporations to file a certified copy of their articles of incorporation in the office of the county clerk of each county wherein they possess real property, has no application to foreign corporations. The only penalty for such failure as provided by that section of the Code is that the delinquent corporation may not maintain an action "in relation to such real property, its rents, issues or profits." Section 293, however, must be construed in conjunction with section 278 of the same Code, which specifically declares that the term "corporation," as it is used in part 4, title 1, of that Code, "unless otherwise expressly provided, refers only to a domestic corporation." Since the Central Life Assurance Society is not a domestic corporation, section 293 of the Civil Code has no application to it.

Nor does article 12, section 4, of the California Constitution broaden the provisions of section 293 of the Civil Code so as to require a foreign corporation to file with the county clerk of the county in which it owns real property, a copy of its articles. That section of the Constitution merely provides: "The term 'corporations,' as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and be subject to be sued, in all courts, in like cases as natural persons."

The preceding section of the Constitution authorizes all corporations to sue and to be sued "in like cases as natural persons." The appellants contend that the foregoing construction of sections 278 and 293 of the Civil Code confining their application to domestic corporations is erroneous for the reason that it discriminates in favor of foreign corporations contrary to the provisions of article 12, § 15, of the Constitution, which provides that: "No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

[3, 4] Such discrimination would render section 293 of the Civil Code unconstitutional and void. It is, however, unnecessary to determine the constitutionality of that section of the Code for the reason that there is no evidence in this case that the Central Life Assurance Society engaged in "transacting business within this state." The purchase of the note and trust deed which are involved in this suit is the only transaction of which there is any evidence in the record. That single transaction does not constitute the conducting of a business. In construing section 405 of the Civil Code, which provides that "No foreign corporation shall transact intrastate business in this State * * * until it has filed with the secretary of state a copy of its articles," it has been uniformly held that a single, isolated transaction does not constitute the carrying on of intrastate business within the meaning of the inhibition of the statute. 6A Cal.Jur. 1595, § 961; General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411; In re Martin, 132 Cal.App. 64, 22 P.2d 269.

[5] Moreover, the appellants waived their right to challenge the omission of the Central Life Assurance Society to file its articles in the office of the county clerk of Los Angeles county, by failing to plead that defense. It is said in 6A California Jurisprudence, page 1377, section 803, in that regard: "The failure to file a copy of articles in the proper county is a mere matter of abatement, which must be specially pleaded by the other party, otherwise it is waived."

A similarity of the names of a daughter and a sister of O. N. Scott plays an important part in the plot to defeat the $6,500 loan. The plaintiff, Marion Scott Aitken, is a sister of O. N. Scott. She was married to John S. Aitken, who formerly worked for Mr. Scott, long prior to the transfer of the record title of the land in question to Marion Scott, which was September 28, 1928. She was commonly known as Marion Aitken. Mr. Scott knew of their marriage. Mr. and Mrs. Aitken did not reside in the home of the Scotts. Mr. and Mrs. Scott had a daughter who, at the time of the transaction in question, was a young girl named Edith Marion Scott, but commonly called Marion Scott. She resided with her parents during that period of time. She was then a single woman, but later she married Mr. Herbert Packard, Jr. Without doubt it was this daughter in whose name of Marion Scott her father placed the record title of the lot in question for the fraudulent purpose of defeating the loan which he proposed to procure. Unquestionably, it was the daughter who within six months thereafter signed and executed the $6,500 note and trust deed. It was the daughter who went before the notary public, Mr. Young, to acknowledge that deed. The evidence leaves no room for any other reasonable conclusion. At the trial when she was asked to write her name of Marion Scott to serve as an exemplar of her handwriting to compare with the signatures on the challenged note and trust deed, under instructions from her former attorney, who is not the present attorney appearing for hearing on this appeal, she refused to do so. We must assume that she refused to furnish that example of her handwriting because it would impeach her denial that she signed the documents. Another persuasive circumstance indicating that it was the daughter and not the sister of O. N. Scott who was intended to hold the record title, and who executed the note and trust deed, is that both the deed from Mr. and Mrs. Scott to Marion Scott, and the deed of trust from her to Mortgage Guarantee Company, designated her as "a single woman." Her aunt, Mrs. Aitken, was not then a single woman, and Mr. Scott knew that fact. It seems absurd for Mrs. Aitken to claim that she held the title to that lot. She admits that she never received the deed to the land. The deed from Scott and wife to Marion Scott was recorded at the request of the grantee, and returned to the address of the home where the daughter lived with her father and mother. Mrs. Aitken did not live there. It is a conclusive fact that the deed from Mr. Scott was never delivered to Mrs. Aitken. It is equally certain it was not the intention of Scott to convey the land to his sister for any purpose or at all.

[6] The findings and judgment to the effect that the plaintiffs conspired with Mr. and Mrs. O. N. Scott, and their daughter, Marion Scott, to defraud Mortgage Guarantee Company of its lien on the Pasadena lot to secure the loan of $6,500 procured in the name of Marion Scott, and quieting title to said lot in Central Life Assurance Company are adequately supported by the evidence. Indeed, the record furnishes very conclusive evidence that the plaintiffs conspired and cooperated with Mr. and Mrs. O. N. Scott and their daughter to perpetrate the fraud by which they sought to place the record title of the lot in the confusing and fictitious name of Marion Scott, without the owners thereof actually parting with its title, and to then procure the loan of $6,500 represented by the note and deed of trust executed in the name of the fictitious title owner of the land, after which the note and trust deed would be repudiated as forged and invalid and the lien of the holder thereof would be thus destroyed and the recovery of the loan defeated. That procedure is exactly what they attempted to carry out. It was a bold and reprehensible plot in which O. N. Scott was the moving spirit.

Among the circumstances appearing in evidence, which, together with the reasonable inferences which may be drawn therefrom in support of the findings and judgment, are the following: O. N. Scott and his wife were owners of the property in question. It was their home. They resided there with their daughter, an unmarried woman, who was commonly known as Marion Scott. Mr. Scott is a brother of the plaintiff, Marion Scott Aitken, who was married to John S. Aitken at the time the transaction which is involved in this case occurred. Her husband formerly worked for Scott in constructing buildings; they previously co-operated in other building transactions conducted in the name of a dummy individual. The Aitkens were not living with the Scotts at the time of this transaction. Mrs. Aitken was not commonly known as Marion Scott, but she was called Marion Aitken. She claimed to have been the Marion Scott to whom the property was deeded, but she knew little about the transaction. She concedes that she never saw the deed. It was not delivered to her. She admits that she did not sign or execute the note or deed of trust. She never saw or heard of them for years after they were executed. She received none of the numerous checks for money paid in the name of Marion Scott to Mr. Scott. Mrs. Aitken claims to have advanced loans to her brother which she asserts became the consideration for his grant of title to her. The evidence of the times and amounts of these loans is unsatisfactory. Her contention in that regard is unreasonable. Her coplaintiff, Arthur Chapman, also worked for O. N. Scott, and co-operated with him in other transactions in the name of a dummy individual.

Mr. Scott wanted to construct a dwelling house on the premises. He personally negotiated the loan. September 28, 1928, Mr. and Mrs. Scott deeded the property to "Marion Scott, a single woman." April 30, 1929, Mr. and Mrs. Scott executed a quitclaim deed of the property to the same Marion Scott. After Scott had negotiated the loan, his daughter, Marion Scott, executed, about five months after she received her deed, the note and trust deed dated March 2, 1929. That trust deed also recites that the trustor, Marion Scott, was an unmarried woman. Nearly a month after that trust deed was executed, Scott went with his daughter to his notary public who took the acknowledgment April 11th, reciting that "Marion Scott, a single woman, known to me to be the person whose name is subscribed to the instrument," acknowledged it. She gave her address to the mortgage company conforming to the residence of her father. The trust deed was recorded at her request and returned to her at her father's address. The payments of money on the loan were made to her or to her father with her full knowledge and it was expended in constructing the dwelling house on the premises. The checks were either cashed by her or by her father. Mr. Scott also personally made the payments to the beneficiary under the trust deed. Mrs. Aitken knew nothing of the details of that transaction.

Within four months from the time the $6,500 note and trust deed were executed, Marion Scott executed another purported note July 15, 1929, for $10,000 to Belle W. Scott, the wife of O. N. Scott, secured by a second trust deed on the same property, which appears as a junior incumbrance thereon. This trust deed was also acknowledged by Scott's notary public, but does not recite that the trustor was an unmarried woman. The notary had no record of this acknowledgment, and he had no recollection of it. He said the trustor was not present when it was acknowledged. Mrs. Belle W. Scott, the mother of Marion, was named as beneficiary of that trust deed. From the similarity of signatures it appears that this second note and trust deed were signed and executed by Scott's sister, Marion Scott (Aitken). Fifteen days after this purported note and trust deed were executed, Belle W. Scott assumed to transfer the note to the plaintiff, Arthur Chapman, in the following language: "For value received I hereby assign all my right, title and interest to the within note, secured by trust deed, without recourse to me, to Arthur Chapman." No written evidence of the foreclosure of this trust deed appears in the record, but Mrs. Aitken testified that it was foreclosed by Arthur Chapman. The complaint, however, alleges that Chapman took the title as trustee for the trustor, Marion Scott. The evidence of the money consideration for this transaction is very unsatisfactory and clearly smacks of fraud. Numerous conflicts of statements made by the plaintiffs and their coconspirators appear in the record. These circumstances, and other facts too numerous to recite, together with the reasonable inferences to be drawn therefrom, fully support the findings and judgment of the court.

[7-9] The plaintiffs claim title to the lot under this purported junior incumbrance transaction. They must recover judgment on the strength of their own title, and not on the weakness of the respondents' title. There is no satisfactory evidence to support their claim of title. For the purpose of this suit it is immaterial whether O. N. Scott actually intended to and did execute his deed of March 2, 1929, to his daughter Marion Scott with the intention of alienating his title to the lot and to thereby convey it to his daughter, whether he merely used her name as a fictitious individual by means of which the conspirators attempted to defraud the creditor and defeat the note and trust deed by pretending they were forged and invalid, or whether he actually conveyed title to his daughter and acted as her agent in the fraudulent transaction. Scott furnished his daughter with the indicia of ownership of the lot and the culpable parties are estopped from denying the validity of the $6,500 note and trust deed. O. N. Scott was the active manipulator of the entire transaction. The plaintiffs and Scott's wife and daughter were his willing accessories to the plot. The name of a grantee of property will be deemed to be fictitious, even if it is the name of a living person, provided the parties assume that name for the fraudulent purpose of consummating the particular transfer. Overton v. Harband, 6 Cal.App.2d 455, 44 P. 2d 484.

[10, 11] The appellants contend that the court erred in receiving in evidence the record of previous consolidated mechanics' lien foreclosure suits, as res adjudicata of the ownership of the property, which involved the same lot in controversy in this suit. That judgment was rendered in March, 1932. The court there found that

"Marion Scott was the name of the record owner" of the land, and that "all said labor and materials were furnished at the request of O. N. Scott and with the knowledge of [his daughter] Marion Scott, who is now the wife of Herbert Packard, Jr." This respondent, Central Life Assurance Society, was not a party to those consolidated suits. The defendants in this suit, Title Guarantee & Trust Company and Mortgage Guarantee Company were also parties defendant in those consolidated mechanics' lien cases. Those actions were dismissed as to the last two named defendants. C. A. Schoch was also a party plaintiff in those cases. He recovered judgment which was subsequently assigned to Central Life Assurance Society. We are, however, of the opinion that judgment is not res adjudicata with respect to the ownership of the land so as to become controlling in this suit, for the reason that the Central Life Assurance Society was not a party to those consolidated mechanics' lien cases. It follows that the record of those cases was improperly received in evidence in this case. However that ruling is harmless. It constituted only cumulative evidence of that fact which satisfactorily appears from an abundance of other evidence adduced at the trial. It was not prejudicial under the circumstances of this case. Moreover, it does not appear there is a miscarriage of justice. The findings and judgment are eminently proper and in accordance with justice. Under article 6, § 4½, of the Constitution that ruling does not constitute reversible error.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

29 Cal.App.2d Supp. 781

PEOPLE v. SETTLES et al.

Cr. A. 1486.

Appellate Department, Superior Court, Los Angeles County, California.

March 28, 1938.

1. Criminal law ⟹37
Lotteries ⟹4

In prosecution for operating a lottery, defense that accused relied upon license issued to their employer under ordinance for licensing games of skill and supposed game to be lawful, and that issuance of license was an entrapment, could not be availed of, since to interpose such defense criminal design must originate with officers of the state and not with the accused, and there was no evidence to support such defense. Pen.Code, § 320.

2. Lotteries ⟹20

Under statute making it a misdemeanor to contrive, prepare, set up, propose, or draw a lottery, criminal intent need not be shown to secure conviction. Pen.Code, § 320.

3. Indictment and information ⟹119
Lotteries ⟹28

Under statute making it a misdemeanor to contrive, prepare, set up, propose, or draw a lottery, complaint charging that accused "wilfully and unlawfully" operated lottery would not impose upon the state the burden of showing criminal intent of accused, since the quoted words were merely surplusage, and even if used in statute would have implied simply a purpose or willingness to commit the act, and not an intent to violate the law. Pen.Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

[Ed. Note.—For other definitions of "Willful and Unlawful," see Words & Phrases.]

4. Lotteries ⟹20

Under statute making it misdemeanor to contrive, prepare, set up, propose, or draw a lottery, if the word "knowingly" were present in the statute, it would require only a knowledge that facts exist which bring the act within the prohibition, that is, a knowledge of facts regarding the operation of the game which facts would make it a lottery and not knowledge of its illegality, so that showing of criminal intent on part of state would be unnecessary. Pen.Code, § 7, subd. 5, and § 320.

5. Criminal law ⟹37
Lotteries ⟹4

Where accused knew all the facts regarding the operation of a lottery which they were conducting, they could not escape prosecution on ground of reliance upon license issued to their employer under ordinance for licensing games of skill causing accused to suppose game to be lawful. Pen. Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

6. Lotteries ⚷3

A municipality could not, by ordinance authorizing police commission to determine whether game to be conducted by an applicant for a license was a game of skill and providing for licensing of such games, interfere with statutes prohibiting lotteries enacted by Legislature in the exercise of the general police power and in obedience to the Constitution. Pen.Code, § 7, subds. 1, 6, § 26, subd. 4, and § 320; Const. art. 4, § 26.

7. Lotteries ⚷4

In prosecution for operating a lottery, no estoppel would arise from act of police commission of municipality in determining that the game in question was one of skill, and further acts of other municipal officers in granting a license for it, since municipality could not interfere with enforcement of the lottery statute, and decision of police commission had no more weight than opinions of any other person. Pen.Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

8. Lotteries ⚷3

Under statute defining lotteries and referring to the prize to be one only as "property" without restrictive words, operation of the game by which the successful player was given right to play without additional charge in further games of the same sort, in evidence of which coupons were issued to him was a "lottery," since duty to permit winner to play further games free was an obligation arising from contract and the right of the player in the matter was personal property, and the thing in action was therefore "property" within the meaning of the Penal Code. Pen.Code, § 7, subds. 10, 12, and § 319; Civ.Code, §§ 654, 655, 663, 953, 1427, 1428.

[Ed. Note.—For other definitions of "Lottery" and "Property," see Words & Phrases.]

9. Lotteries ⚷3

Under statute prohibiting lotteries, whether a game is one of skill or a game of chance depends on whether element of skill or element of chance is dominant in determining the result. Pen.Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

10. Lotteries ⚷30

Where the factors of skill and chance are both present in a game alleged to constitute a prohibited lottery, question of the character of the game is one of fact. Pen. Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

11. Criminal law ⚷823(4)

In prosecution for operating a lottery, where game conducted by accused required player after covering a row of numbers on card to throw a dart at a circle above the board, and, in order to win, the dart was required to land within circle in three throws, instruction that no matter how much skill was involved, if there was an element of chance game was lottery, was prejudicial error, notwithstanding jury was correctly instructed elsewhere. Pen.Code, § 7, subds. 1, 5, § 26, subd. 4, and § 320.

12. Criminal law ⚷778(5)

In lottery prosecution, modification of requested instruction to read that if jury was satisfied from the evidence beyond a reasonable doubt that the game conducted by accused was a game of skill or science, not of chance, then it was jury's duty to find accused not guilty, was erroneous, in that it implied that burden was upon accused of proving beyond a reasonable doubt that game conducted by them was one of skill, since accused would be entitled to an acquittal if evidence raised in minds of jury a reasonable doubt on such point. Pen. Code, § 320.

◆

Appeal from Municipal Court of Los Angeles; C. Newell Carnes, Judge.

Tom Settles and others were convicted of running a lottery, and they appeal.

Judgment reversed and remanded. Appeal from order dismissed.

John G. Harrah and H. C. Millsap, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

Defendants were convicted on a charge of running a lottery, and they appeal. They were not the proprietors of the place where the acts forming the basis of the charge were committed, but merely employees. They rest their defense in part on the fact that the proprietors had a license from the city of Los Angeles to operate the particular game found by the jury to be a lottery. They testified that they knew of this license, and in reliance on it supposed the game to be lawful. Hence, it is argued, they had no criminal intent. The license above mentioned was issued under a Los Angeles city ordinance which provides for licensing games of skill, and directs the police commission to determine whether the game to be conducted by an applicant for a license is a game of skill, and, if they find it to be such, to issue a permit on which the license may be obtained.

[1] The argument upon this license is presented in several forms. It is said to constitute an entrapment. But an essential ingredient of that defense, as is held in the authority cited by defendants, is that the criminal design originated, not with the accused, but with officers of the state. Sorrells v. U. S., 1932, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249. There is nothing of the kind here.

[2-5] Next it is contended that by reason of defendants' knowledge of the license they had no criminal intent. Their testimony on this point amounts to no more than saying that they did not know their acts were unlawful. But no such knowledge was necessary here. Section 320 of the Penal Code requires no specific intent as a part of the crime there denounced. It merely makes it a misdemeanor to contrive, prepare, set up, propose, or draw a lottery, not even using the words "wilfully" or the word "unlawfully." Those words appear in the complaint here, but they are merely surplusage and cannot add to the burden of proof of the prosecution. The word "wilfully," if it had been used in the statute, would have implied simply a purpose or willingness to commit the act (which appeared here), not an intent to violate the law. Penal Code, § 7, subd. 1. Even the word "knowingly," if present in the statute, would require only a knowledge that the facts exist which bring the act within the prohibition, that is, a knowledge of facts regarding the operation of the game which facts would make it a lottery, not a knowledge of its illegality. Penal Code, § 7, subd. 5. In re Ahart, 1916, 172 Cal. 762, 159 P. 160, on which defendants rely, goes no farther than to read into the ordinance there involved a requirement, not expressed therein, that to constitute a violation of it there must be knowledge of the facts making the act done unlawful. This is nothing more than the application to the case of Penal Code, § 26, subd. 4, which declares persons incapable of committing crimes who committed the act charged under an ignorance or mistake of fact which disproves any criminal intent. Here defendants knew all of the facts regarding the operation of the game in question, and they cannot escape from prosecution therefor because of any opinion they may have held that upon those facts the game was lawful. See People v. O'Brien, 1892, 96 Cal. 171, 176, 31 P. 45; People v. Hartman, 1900, 130 Cal. 487, 490, 62 P. 823; People v. McClennegen, 1925, 195 Cal. 445, 469, 234 P. 91; People v. Dillon, 1926, 199 Cal. 1, 7, 248 P. 230; People v. McCalla, 1923, 63 Cal.App. 783, 793, 794, 220 P. 436; People v. Leach, 1930, 106 Cal. App. 442, 446, 290 P. 131; People ex rel. Los Angeles Bar Ass'n v. Calif. Prot. Corp., 1926, 76 Cal.App. 354, 363, 244 P. 1089.

[6, 7] It appears to be contended also that some sort of estoppel arises from the act of the police commission in determining that the game in question was one of skill, and the further acts of other city officers in issuing a license for it. If the official action thus relied on had been that of some officer directly charged with the duty of enforcing the law against lotteries and one of his duties had been that of issuing permits for games which in his opinion were not lotteries, we would have a case much like People v. Ferguson, 1933, 134 Cal.App. 41, 53, 24 P.2d 965, and if we were to follow that case we might be required to hold that a defense appeared. But we have here no such situation as was presented there. The law prohibiting lotteries is a part of the Penal Code, enacted by the state Legislature in its exercise of the general police power of the state and in obedience to a constitutional mandate found in section 26, article 4 of our State Constitution. With such enactments cities have no power to interfere. The state has not confided to the police commission any authority in the enforcement of the lottery statute or any power to determine what is and what is not a violation thereof. The city cannot confer such jurisdiction, no matter how strongly it may attempt to do so, for this is not a municipal affair. The decision of the police commission in this matter has and can have no more weight than the opinions (known to defendants) of any other persons, which, as held in People v. McCalla, supra, and People v. Leach, supra, afford no ground of defense even if given by persons supposed to be learned in the law.

[8] Defendants also contend that the game in question was not a lottery because,

as far as the evidence shows, the thing won by the successful player was only a right to play without additional charge in further games of the same sort, in evidence of which coupons were issued to him. Except where such coupons were presented, a charge was made for the privilege of playing. Section 319 of the Penal Code, which defines a lottery, refers to the prize to be won therein only as "property," without any restrictive words. We see no reason for holding that this word is used here in other than its most general sense. In fact, section 7 of the Penal Code provides that "the word 'property' includes both real and personal property" subdivision 10, and "the words 'personal property' include money, goods, chattels, things in action, and evidences of debt." Subdivision 12. These definitions are not exclusive of anything else properly coming within the terms defined. "A thing in action is a right to recover money or other personal property by a judicial proceeding." Civil Code, § 953. "Property" is further defined in the Civil Code as a "thing of which there may be ownership." Civil Code, § 654. There may be ownership, among other things, "of all obligations." Civil Code, § 655. "An obligation is a legal duty by which a person is bound to do or not to do a certain thing," Civ.Code, § 1427, and it may arise from contract. Civ.Code, § 1428. The duty of the operators of this game to permit the winner to play further games free is an obligation arising from contract, and the right of the player in the matter is personal property, Civil Code, § 663, and a thing in action. It is, therefore, property within the meaning of section 319, Penal Code. See Ponsonby v. Sacramento Suburban F. L. Co., 1930, 210 Cal. 229, 232, 291 P. 167; Colbert v. Superior Confection Co., 1931, 154 Okl. 28, 6 P.2d 791, 793; United States v. Purvis, D.C., 1912, 195 F. 618, 622.

[9, 10] Defendants also contend that the game was in fact one of skill, not chance, and hence not a lottery. A game is not to be regarded as one of skill merely because that element enters into the result in some degree, or as one of chance solely because chance is a factor in producing the result. The test of the character of a game or scheme as one of chance or skill is which of these factors is dominant in determining the result. 38 Corpus Juris 291; D'Orio v. Startup Candy Co., 1928, 71 Utah 410, 266 P. 1037, 60 A.L.R. 338, 341, and note; Stevens v. Cincinnati Times-Star Co., 1905, 72 Ohio St. 112, 73 N.E. 1058, 106 Am.St.Rep. 586; People ex rel. Ellison v. Lavin, 1904, 179 N.Y. 164, 171, 71 N.E. 753, 66 L.R.A. 601, 1 Ann.Cas. 165; U. S. v. McKenna, D.C., 1906, 149 F. 252. If both of these factors are present, the question of the character of such game or scheme in this respect is ordinarily one of fact. The game conducted by defendants here was substantially the same, up to the time a player covered a row of numbers on his card, as the game of tango considered by us in People v. Babdaty, 1934, 139 Cal.App.,Supp., 791, 30 P.2d 634; the differences being merely formal. Had there been nothing further in the game here, it would unquestionably have been a lottery, as was held in People v. Babdaty. But here it appears that after covering a row of numbers on his card a player was required to throw a dart at a circle upon a board (a four-inch circle for men, a six-inch circle for women), and in order to win must land his dart within the circle in three throws. This introduced a new element into the game. Considerable evidence was introduced upon the question whether the landing of the dart within the circle in three throws was a matter of chance or skill. Upon this evidence the jury might reasonably have found either way. If they found that the landing of the dart in the circle was entirely a matter of skill, or that it depended more on skill than chance, they might then have concluded further that the skill so exerted, rather than the chance which covered the row of numbers, was the dominent element of the game, and acquitted the defendants.

[11] On this point we find that the court erred in its instructions. The court did give an instruction (plaintiff's L) declaring the rule by which the character of the game was to be tested, substantially as we have above stated it. But the court also gave, at the request of plaintiff, an instruction T, which appears to state a contrary rule. It reads, in part, "the mere fact that winning a prize in a game may require some skill, or even a very high degree of skill, and that skill is a very great factor in it, does not make a game any the less a lottery if it has other features necessary to make it a lottery. * * * In other words, no matter how much and how great skill is required the game is still a lottery if it has the other required features of a lottery." Elsewhere the jury were correctly instructed that "the elements of a lottery are, (1) the disposition of property; (2) upon a contingency determined by chance; (3) to a person who has

paid a valuable consideration for the chance of winning the prize" (plaintiff's H), and that "chance is an essential element of a lottery" (plaintiff's E). Reading all these instructions together, the jury must have understood T to mean that no matter how much skill was involved, (even though a dominating factor) if there was an element of chance in a game it was a lottery. In fact, they might easily gain the same impression from parts of T not above quoted. The verdict indicates that they may have followed this erroneous instruction. The giving of such conflicting instructions on a material point is prejudicial error. People v. Westlake, 1899, 124 Cal. 452, 457, 57 P. 465; People v. Maughs, 1906, 149 Cal. 253, 261, 86 P. 187.

[12] The defendants requested this further instruction No. 7: "I instruct you that unless you are satisfied from the evidence beyond a reasonable doubt that the game conducted by defendants was a game of chance, then it is your duty to find the defendants not guilty." This was a correct instruction. The court modified it and gave it as follows: "I instruct you that if you are satisfied from the evidence, beyond a reasonable doubt, that the game conducted by defendants was a game of skill or science and not of chance, then it is your duty to find the defendants not guilty." This instruction as modified implied that the burden was upon defendants of proving, beyond a reasonable doubt, that the game conducted by them was one of skill. This is not the law. The defendants would be entitled to an acquittal if the evidence raised in the minds of the jury a reasonable doubt on this point. People v. Roe, 1922, 189 Cal. 548, 564, 565, 209 P. 560; People v. Roberts, 1898, 122 Cal. 377, 55 P. 137.

The judgment is reversed and the cause is remanded to the municipal court for a new trial. The appeal from the order denying motion for a new trial is dismissed.

BISHOP and SCHAUER, JJ., concur.

11 Cal.2d 139

WOOD v. STATE BAR OF CALIFORNIA.

L. A. 16594.

Supreme Court of California.

April 15, 1938.

Attorney and client ⚷58

An attorney who failed to file complaint for clients, though clients had paid filing fee, and asked clients to pay filing fee again without informing them that he had been suspended from practice of law, would be suspended for three months.

◆

In Bank.

Disciplinary proceedings in the matter of Buel R. Wood, an attorney. To review a recommendation of the Board of Governors of the State Bar that he be suspended from the practice of law for three months, Buel R. Wood brings writ of review.

Petitioner suspended.

Buel R. Wood, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

The petitioner seeks a review of the recommendation of the Board of Governors of the State Bar that he be suspended from the practice of law for a period of three months.

The petitioner, a native of South Dakota, now forty-nine years of age, was admitted to practice law in this state in November, 1923. He had previously practiced in South Dakota and Texas. In May, 1937, he was heard before the local administrative committee of Los Angeles county on charges of violation of his duties as an attorney and of conduct involving moral turpitude.

No serious dispute is presented as to the facts. The petitioner was employed in April, 1936, by Hazel Carothers, a minor, and her father to commence an action for damages on account of personal injuries sustained by the minor alleged to have been caused by the negligence of another. On April 18, 1936, the petitioner received from the Carothers the sum of $7. The receipt given by him showed that it was accepted as "retainer," and that there remained unpaid "balance of fee $8.00." On April 24th he receipted for $7 as the filing fee. An additional $10 was paid during the same month, which, together with the previous $7 on account of retainer, the committee found constituted the petitioner's retainer fee for preparing and filing the complaint and the application for appointment of guardian ad litem. The payment of fee for further services was contingent upon recovery and to be measured by twenty per cent of the amount of recovery. A complaint in the action was never filed by the petitioner.

On June 19, 1936, this court adopted the recommendation of the Board of Governors in a previous disciplinary proceeding and ordered the suspension of the petitioner for a period of six months commencing July 19, 1936, and terminating January 19, 1937. 6 Cal.2d 533, 58 P.2d 1280. The petitioner did not communicate the fact of this suspension to the Carothers, and failed to communicate with them until February 12, 1937. The content of his letter at that time was a request for payment of the filing fee, which in fact had already been paid to him. The Carothers thereupon retained other counsel to commence the action which was about to be barred by the statute of limitations, and complained to the State Bar of the petitioner's misconduct.

The Board of Governors adopted the findings of the local administrative committee, with the exception that it found that the retainer was to be $25 instead of $17.

The record shows that in 1930 a reprimand was administered to the petitioner for neglect in connection with still another matter heard by the then local administrative committee of Los Angeles county.

The petitioner has not shown herein that the findings or recommendation of the board are erroneous, unlawful, or improper. The petitioner's own statements in the record furnish additional evidence that he still is remiss in his duties and obligations as an attorney. Under all the circumstances the discipline recommended by the board is not too severe.

It is therefore ordered that the petitioner be suspended from the right to practice law in this state for a period of three months to commence thirty days from and after the filing of this order.

11 Cal.2d 141

GELBERG v. STATE BAR OF CALIFORNIA.

L. A. 16559.

Supreme Court of California.
April 15, 1938.

Attorney and client 🔑58

An attorney, who permitted employees who did not own property to act as sureties on bonds when an inquiry would have revealed employees' disqualification as sureties when the qualifications of sureties were challenged by a litigant who obtained judgment on bond, could not claim ignorance of the practice and was subject to suspension for period of one year. Code Civ.Proc. § 689, as amended by St.1935, p. 1947.

In Bank.

Proceeding by Samuel S. Gelberg against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that petitioner be suspended from practice of law for a period of one year, and praying that a recommendation of the local committee that petitioner be given only a public reprimand be adopted.

Petitioner suspended from practice of law for period of one year.

Jerry Giesler and S. Ward Sullivan, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the board of governors of the State Bar that petitioner, Samuel S. Gelberg, be suspended from the practice of the law for a period of one year. The board of governors by a unanimous vote adopted the findings of fact made by the local committee which heard the charges against petitioner, but by a divided vote rejected the recommendation of the local committee that he be given only a public reprimand. The petitioner prays this court to adopt the recommendation of the local committee. He does not deny that he was guilty of negligence in the conduct of his practice, as found by the committee.

The local committee found that petitioner had "been guilty of negligence in overlooking and overseeing his office, permitting a system of nonproperty owning employees to sign bonds of various kinds as an incident of and as a part of their employment without any recognition or knowledge on their part of what they were doing and without any expectation on their part to be bound." The committee further found that investigation by the respondent of the course of conduct in his office would quickly have disclosed this practice, and proper supervision would have prevented it. In support of his plea that a public reprimand is the appropriate penalty, petitioner points to the fact that the local committee did not find that he had actual knowledge that his employees who were signing bonds did not own property.

The order to show cause listed ten bonds filed in eight different actions in which petitioner was the attorney of record. These bonds were filed between September 30, 1935, and September 8, 1936. Eight of the bonds were attachment bonds. The remaining two were filed pursuant to section 689, Code of Civil Procedure, as amended by St.1935, p. 1947, which provides that property upon which execution has been levied shall be released where a third party claim is asserted unless an undertaking is filed. The bonds were respectively in the following amounts: $50, $216, $261, $301.24, $320, $500, $825, $1,000, $5,000, and $30,000. All except the bonds for $5,000 and $30,000 were filed in the municipal court of Los Angeles. The bond for $30,000, filed in the superior court, was inadvertently drawn in that amount, instead of for $3,000.

Petitioner had a large practice in the collection of accounts for clients. The actions in which the bonds were filed were all brought in the name of M. Moser, an employee of petitioner, as assignee for collection. The employees of petitioner who signed bonds were Dora Wallin, Eleanor Morales, Jerry Greenfield, and Marie Moser. In two instances Marie Moser signed attachment undertakings both as principal and surety. These several employees were all young women who did clerical work in petitioner's office at salaries of between $45 and $60 a month. Eleanor Morales was a minor and under the age of eighteen years when she signed bonds as a surety.

Petitioner cannot contend that he was not aware of the practice of having employees in his office sign bonds, since he himself testified that this practice was inaugurated in 1927 when he employed an attorney to organize his law office. Petitioner was admitted to practice in New York in 1916. He was admitted in this state in 1925. As his practice grew in this state, he felt the need of assistance of a person who was familiar with the organization of large law offices, and hence acquired the services of an attorney who, according to petitioner, started the practice of having employees sign as sureties on bonds in municipal court actions. He testified that said attorney told him such practice was usual in this state. The extent to which petitioner may claim ignorance of the practice in his office in regard to bonds is that he did not know that employees who were signing as sureties did not own sufficient property to qualify them.

Petitioner testified that the portion of his legal business which involved the collection of accounts, and which he described as the commercial or collection department, was not under his personal supervision. Except for the period between February and October, 1936, he employed one or two attorneys. His wife and a Mrs. Baker, who were not attorneys, also worked in a supervisory capacity in said department. Petitioner had a large bankruptcy practice to which he devoted his personal attention. However, five of the ten bonds referred to in the order to show cause were filed during the period when no other attorney was connected with petitioner's office, and when, according to petitioner's testimony he had "very little" general practice by reason of economic conditions.

The young girls who signed the bonds testified that no inquiry had ever been made of them as to whether they owned property. They signed the bonds and the affidavits to the effect that they were worth the penal sum of the bond over and above all just debts and liabilities, exclusive of property exempt from execution, without realizing fully the nature of the instruments they signed. Eleanor Morales customarily made up the bonds by filling in blank spaces on forms, and brought them to the other girls to sign as sureties. This practice of Miss Morales had developed as a result of instructions given her by persons in a supervisory position in the office. Miss Morales then took the bonds to Mrs. Baker, who as a notary signed the jurat to the affidavit of the sureties. All the young women who acted as sureties testified that petitioner had never asked them to sign a bond, nor discussed the matter with them.

In October, 1936, a complaint was made to the State Bar by one Rushton. Mr. Rushton was the third party claimant to property upon which execution had been levied to satisfy a municipal court judgment for $300 rendered in favor of M. Moser against one Stadden. To prevent the release of this property to the third party claimant, the judgment creditor filed an undertaking in the sum of $50, upon which E. Morales and D. Wallin were sureties. Rushton excepted to the sufficiency of the sureties. The judge of the municipal court in which the action was tried testified upon the hearing before the local committee, and said committee found, that he justified the sureties upon the assumption that petitioner, as their employer, would be responsible upon said bond in case of any claim thereon.

Thereafter it was determined that Rushton had title to the property and an order was made for its return to him. On July 28, 1936, Rushton secured a judgment in the small claims court against Moser, Morales and Wallin in the sum of $50, as damages sustained by him by reason of the taking of his property. After a failure to pay the judgment on Rushton's demand, he called at the office of the State Bar in October, 1936. On November 12, 1936, petitioner was advised by the State Bar that complaint had been made against him. During the month of December petitioner was authorized by his client on whose behalf the action had been brought in the name of Moser to pay the small claims' court judgment from funds of the client which petitioner had on hand. He did not pay Rushton this amount until February 2, 1937, almost a month after the preliminary hearing and after the local committee had issued an order to show cause. Rushton testified that Miss Wallin offered on the telephone to settle his claim for $10.

Petitioner admits his culpability in permitting his law office to be conducted in such a manner that his employees who did not own property were regularly acting as sureties on bonds. In explaining his lack of closer supervision he points to his large practice and the fact, as testified by him, that he devoted himself largely to other phases of his legal practice. However, five of the ten bonds were filed during the period when no other attorney was connected with petitioner's office, and when, according to his own testimony, he had very little general practice.

The proceedings in connection with Rushton's third party claim must have forcibly drawn to petitioner's attention the fact that young women in his office, who were receiving salaries of not more than $60 a month, were signing bonds as sureties. Petitioner's explanation of this matter is that he told the judge that he owed the girls more than the amount of the bond ($50) at that time. He was concerned only with $50, and the thought of them being worth in excess of $50 did not come into his mind.

Miss Esty, the attorney representing Rushton, testified that she asked petitioner for a list of the properties upon which Miss Morales and Miss Wallin had justified as sureties. One of said sureties opened her purse and took out a check for $50. Miss Esty testified that petitioner waved this check in her face and asked her if that didn't look as if the surety had sufficient property to pay a $50 judgment. Petitioner also made the following statement before the local committee: "I talked to other people in the office about the general worth of my employees and received the information that they were worth * * * that they were saving their money and were worth money." Mrs. Gelberg testified that it was her belief when the bonds were signed, and she still continued in the belief, that any one of the girls was worth $500 by reason of being permanently employed.

It also appears that in October, 1935, exception had been taken to the sureties on a bond filed in another case to prevent release of property upon a third party claim. Petitioner testified that he discussed the matter with the attorney on the other side in said case, and that the third party claim was withdrawn pursuant to stipulation.

On September 25, 1936, Miss Morales and Miss Wallin were examined as to the property owned by them in a supplementary proceeding initiated by Rushton after the entry of the judgment against them in the small claims court for $50. Petitioner has devoted several pages in his brief to the proposition that he first had knowledge on September 25, 1936, that employees in his office who were not able to justify as sureties were signing bonds.

We are of the view that petitioner cannot in good faith claim that his ignorance of the financial irresponsibility of his employees to act as sureties continued to that late date. Any inquiry at all of said employees when Rushton excepted to their sufficiency as sureties would have revealed their disqualification, and this in turn should have served notice on petitioner as to the dangerous practices in vogue in his office in regard to bonds. Instead, three more bonds were filed in the amounts of $825, $216, and $30,000, with nonproperty owning employees as sureties. In view of the Rushton proceedings, petitioner's neglect is of such character as to constitute a wanton indifference to existing material facts which would have been revealed by the slightest effort on his part.

After Rushton had secured the judgment in the sum of $50 against petitioner's employees on July 28, 1936, on account of the wrongful taking of Rushton's property, petitioner did not pay said judgment. Indeed, one of the surety-employees made an effort to settle Rushton's claim by the payment of $10. In December, 1936, petitioner was authorized by his client on whose behalf he had procured the judgment upon which execution was levied, to apply said funds of said client to the satisfaction of Rushton's judgment, but petitioner delayed in making this payment until February 2, 1937, almost a month after the local committee had issued its order to show cause against him.

In the circumstances, we are of the view that suspension for a period of one year, as recommended by the board of governors of the State Bar is not, as petitioner urges, so excessive as to call for a modification. It is therefore the order of this court that, pursuant to the findings and recommendation of said board of governors, petitioner be and he hereby is suspended from the practice of the law in this state for a period of one year, effective thirty days after the filing of this order.

26 Cal.App.2d 27

GOVEA v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

Civ. 6072.

District Court of Appeal, Third District, California.

April 18, 1938.

1. Dismissal and nonsuit 🔑60(6)

A stipulation entered into in open court for continuance of the trial of an action to a date which was more than five years from the date of commencement of the action, of which an entry was made in the minutes of the court, estopped defendant from thereafter moving to dismiss the cause for want of prosecution under the statute, notwithstanding that the provisions of the statute were not strictly complied with in entering into the stipulation. Code Civ.Proc. § 583, as amended by St.1933, p. 853.

2. Prohibition 🔑3(1)

A defendant was not entitled to a writ of prohibition to restrain a trial judge from proceeding with trial of an action which defendant had moved to dismiss for want of prosecution, on ground that minutes of the court showing continuance of the action beyond the statutory five-year period by stipulation of the defendant's counsel were not correct, since remedy was by motion in the trial court for correction of the minutes, and court in which the writ of prohibition was sought had no power to disregard, or to consider any affidavit questioning, the minutes of the trial court. Code Civ.Proc. § 583, as amended by St.1933, p. 853.

3. Appeal and error 🔑662(1)

The minutes of the trial court import absolute verity and cannot be collaterally attacked or questioned in an appellate court.

Proceeding by Manuel Govea for a writ of prohibition against the Superior Court of the State of California in and for the County of Merced, to restrain the respondent from proceeding with trial of an action.

Writ denied, and petition dismissed.

Hjelm & Hjelm, of Turlock, for petitioner.

F. A. Silveira, Dist. Atty., and A. A. Henderson, Deputy Dist. Atty., both of Merced, for respondent.

L. A. MacNicol, of Merced, amicus curiae.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the above-named petitioner for a writ of prohibition enjoining and restraining the respondent from proceeding with the trial of a certain action numbered 9685, pending in said court, wherein B. B. Tatum, Ethel Tatum, and Darwin Tatum, by his guardian ad litem, B. B. Tatum, are plaintiffs, and Manuel Govea is defendant, on the grounds that the defendant's motion in said action to dismiss for want of prosecution should have been granted.

The record shows that the complaint in the action just named was filed on the 9th day of November, 1932; that the defendant's cross-complaint and answer thereto was filed on March 7, 1933. The record also shows that after the beginning of the action just named various orders were made by the trial court, which are not necessary to be set out herein as they do not affect the question to be decided.

It further appears from the pleadings submitted upon this motion that on the 21st day of January, 1938, counsel for the defendant Manuel Govea appeared in court and moved that the action taken against Govea be dismissed on the ground that said action had not been brought to trial within the period of five years. The motion was argued and submitted to the court, and thereafter, on the 18th day of February, 1938, the trial court made and entered the following order:

"Department 1

"February 18, 1938.

"Present: Hon. E. N. Rector, Judge
"Myrtle Oliver, Deputy Clerk
"Lloyd Dethlefson, Reporter.
"Harry Doyle, Bailiff.

"B. B. Tatum, et al.,
Plaintiffs and Cross-defendants,
vs.
Manuel Govea,
Defendant and Cross-Complainant.
No. 9685

"The court files its ruling on motion to dismiss, as follows:

"(Title of court and matter)
"(Ruling on Motion to Dismiss)

"The complaint was filed November 9, 1932. In April of 1937, on plaintiff's memo to set the case for trial it was placed on the calendar for trial on November 5, 1937.

"The minutes of the court show that on motion of defendant's counsel on September 21, 1937, and stipulated to by plaintiffs' counsel, the date of trial was continued from November 5th, to November 12, 1937, which latter date was three days over five years after the filing of the complaint. On November 10, 1937, Hon. H. S. Shaffer, of his own motion, according to affidavit of plaintiffs' counsel, because of congestion of the court calendar with jury cases, continued the trial date of this case from November 12, 1937, to January 21, 1938. I hardly see how defendant could complain of this.

"At the hour set for the trial on January 21, 1938, defendant's counsel moved for dismissal of the action on the ground of lack of prosecution, as more than five years had elapsed since the filing of the complaint.

"Regardless of the fact that notice of motion to dismiss was not given, the court is of the opinion that a stipulation of the parties in open court which was entered by the clerk in the minutes of the court, is a sufficient stipulation of the parties in writing under section 583, C.C.P., as amended by St.1933, p. 853, for extension of the time of trial beyond the five year limitation.

"The statement by defendant's counsel in a letter-brief that he did not enter into the stipulation for continuance is not sufficient to impeach the minutes nor to prevail against the affidavit of opposing counsel.

"For the reasons above stated the motion to dismiss is denied.

"Dated: February 19, 1938.

"E. N. Rector,
"Judge of the Superior Court.

"Endorsed: Filed this 18 day of Feb. 1938.

"P. J. Thornton, County Clerk.
"By Cecilia Johnson, Deputy."

As a part of the petition filed herein the petitioner filed an affidavit stating in substance that no counsel appeared in the court on the 21st day of September, 1937, but that the clerk of the court had been telephoned to by counsel for the defendant requesting that the action against Govea be continued for trial until the 12th day of November, 1937, and that no stipulation in writing was ever entered into continuing the trial of the action until November 12, 1937. The continuance so made postponed the trial of said action to a time three days after the expiration of five years from the date of filing the plaintiff's complaint.

The minute order of the court, as shown by the records thereof, relating to the continuance of the trial of said action from November 5, to November 12, 1937, is in the words and figures following, to wit:

"Department 11.
"September 21, 1937

"Present: Hon. Albert F. Ross, Judge.
"Myrtle Oliver, Deputy Clerk.
"Lloyd Dethlefson, Reporter.
"Geo. W. Egenhoff, Bailiff.

"B. B. Tatum, et al.,
Plaintiffs,
vs.
Manuel Govea,
Defendant.
No. 9685

"Upon motion of Harold Hjelm, counsel for defendant, and upon stipulation of respective counsel, it is ordered that trial date of above entitled matter be postponed from November 5, 1937, to November 12, 1937, at 10 A. M."

[1-3] The first contention of the petitioner is to the effect that, if counsel were actually present in open court and orally stipulated to the continuance of the trial, and the entry thereof was made in the minutes of the court, the provisions of section 583 of the Code of Civil Procedure, as amended, were not complied with, and that the petitioner's motion to dismiss the case of Tatum v. Govea should have been granted. To this contention there is a complete answer, first, that if such a stipulation entered in the minutes of the court does not literally comply with the language of section 583, supra, it does estop the petitioner from thereafter making a motion to dismiss the cause for want of prosecution under said section; that a party to an action cannot be allowed in such manner to play fast and loose with the court, either proposition of which is a bar to the granting of the petitioner's motion to dismiss; second, the petitioner calls our attention to an affidavit submitted with the motion to the effect that counsel was not personally present in court at the time the trial of the cause was continued from November 9, 1937, to November 12, 1937, and that the minutes of the court are not correct. This,

however, furnishes no ground for disturbing the ruling of the trial court denying the motion. If the minutes of the trial court do not speak the absolute truth, the petitioner's remedy is by motion in the trial court for the correction of its minutes. This court has no power to disregard the minutes of a trial court, or to consider any affidavit to the effect that the minutes of the trial court are not correct and should be amended. In other words, the minutes of the trial court import absolute verity, and cannot be collaterally attacked or questioned in an appellate court.

In 15 C.J. p. 979, we find the following: "The records of the proceedings of a court of record made and kept pursuant to law constitute the legal evidence of its judgments, orders, and other proceedings. Such records import absolute verity, unless or until they are reversed and set aside, and cannot be attacked within the jurisdiction of the court, nor are they subject to collateral attack."

A large number of cases are cited in the notes supporting the rule just stated.

That the records of a trial court import absolute verity and cannot be questioned upon appeal was decided by the Supreme Court in the case of People v. Judge of Tenth Judicial District, 9 Cal. 19. In deciding that case the court used the following language: "The power to determine every issue between parties, must be placed somewhere. There must be an end of controversies, or the system must fail to accomplish the very object intended. The District Courts are Courts of original jurisdiction, of the highest order known to our Constitution. They are Courts of grave dignity, and are required to keep a record of all their proceedings; and after they have assumed to do so, can their records be corrected by any other power known to our law? The proceedings are known to these Courts, because they take place in their presence. Can a jury be called in to decide as to what occurred in the presence of the Court? Juries are used as instruments, to determine facts unknown to the Courts. But a Court does not require the verdict of a jury to inform it of facts occurring in the presence of the Court itself. Courts of such extended jurisdiction and grave responsibility as the District Courts must, from the very nature of the case, be trusted as to the fidelity of their own records. It would destroy all confidence in the verity of the records of these Courts were the rule once laid down that their truth could be questioned."

The same rule was affirmed in the case of Willson v. Broder, 24 Cal. 190. The court there said: "It appears of record that the argument was before a full Bench, and the record cannot be attacked collaterally. If the entry was erroneous, the error should have been brought seasonably to the notice of the Court, on a direct motion to correct it."

Quotations from the opinions in cases decided in other jurisdictions to the same effect appear to us to be unnecessary.

The petitioner's remedy, if any, is first, in the trial court, upon motion for the correction of its minutes. The affidavit of the petitioner cannot be considered.

The writ is denied, and the petition dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

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25 Cal.App.2d 674

McKENZIE v. SANTA FE TRAIL STAGES.

Civ. 11799.

District Court of Appeal, Second District, Division 2, California.

April 13, 1938.

Appeal and error 🔑**627(2), 773(2)**

Where appellant had not filed a transcript or brief within time prescribed by law, motion to dismiss appeal was granted.

Appeal from Superior Court, Los Angeles County.

Action by William E. McKenzie against the Santa Fe Trail Stages, a corporation. From a judgment adverse to plaintiff, plaintiff appeals.

Appeal dismissed.

William H. Taylor, of Los Angeles, for appellant.

Shattuck, Davis & Story, of Los Angeles, for respondent.

PER CURIAM.

Upon submission of the motion to dismiss herein the presiding justice in open court made the following statement:

This case comes before us on motion to dismiss the appeal on the ground that appellant has not filed a transcript or brief within the time prescribed by law. The motion is good and it is granted.

The appeal is dismissed.

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25 Cal.App.2d 676

KENT v. COUNTY FIRE INS. CO. OF PHILADELPHIA.

Civ. 11727.

District Court of Appeal, Second District, Division 2, California.

April 13, 1938.

Appeal and error 🔑480

Where order restraining execution on judgment on fire policy in favor of an alleged assignee of insured's cause of action was set aside in interpleader action filed by insurer to determine parties entitled to the proceeds of the judgment which were claimed by several creditors of insured, and the insurer perfected an appeal from an order denying application for statutory relief from judgment which insurer sought so that insurer could file pleadings to protect it from being forced to pay the judgment twice, insurer was entitled to a stay of execution on the judgment until final termination of the appeal upon giving a bond to protect the judgment. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

◆

Action by M. Kent against the County Fire Insurance Company of Philadelphia on a fire policy. Judgment was entered for the defendant. The defendant filed notice of application for relief from the judgment, and, from an order denying the application, the defendant appeals. On petition by defendant for stay of execution on the judgment until final determination of the appeal.

Order restraining execution until final determination of the appeal granted on defendant giving a bond.

Hindman & Davis, of Los Angeles, for petitioner and appellant.

A. Brigham Rose, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is a petition by the defendant for the stay of execution on the judgment until the final termination of the appeal.

On April 23, 1937, plaintiff filed this action against the defendant in the superior court of Los Angeles county, No. 414921. The action was upon a policy of fire insurance issued by the defendant, as insurer, to Harry Knight and Cecelia Ayulard to recover for a fire loss occurring October 18, 1936; the plaintiff alleging that he was the assignee of the choses in action of said named assureds. The defendant appeared and answered and defended to judgment, by the same counsel as appears herein. Judgment was entered on September 22, 1937, in favor of the plaintiff against the defendant for the sum of $2,200, with interest and costs. Motion for new trial was denied on October 27, 1937. Prior to the entry of said judgment there were served on the defendant or its authorized agents the following: (a) Two orders signed by Harry Knight to pay certain sums to certain third persons of and from moneys which became or were to become due to Harry Knight under the policy in suit; (b) certain writs of attachment out of various actions by third persons claiming to be creditors of Harry Knight, against Harry Knight, which were then and are now pending, commanding the attaching officer to attach and safely keep all property of Harry Knight to satisfy certain demands, and giving notice that all moneys and debts due or owing and any personal property in their possession or under their control belonging to said Harry Knight were attached by virtue of said writs; (c) a writ of execution in which the officer was commanded to take out of the property of Harry Knight certain sums of money, and giving notice to the defendant that all moneys due or owing Harry Knight were attached by virtue of said writ. The total amount of moneys so ordered to be paid and attached and levied upon is in excess of $1,500.

Upon denial of the motion for new trial there was filed by the defendant herein an action in interpleader in the superior court of Los Angeles county, No. 421941, in which action plaintiff herein and Harry Knight and all of the payees of orders and attaching and levying creditors heretofore mentioned were made defendants, as was also the county clerk and county sheriff, for the reason that the defendant herein was unable to ascertain the identity or whereabouts of M. Kent. Said action in interpleader was filed by the defendant pursuant to its belief that same was a proper remedy to protect itself against the plaintiff's judgment herein and against the adverse claims of the defendants named in said interpleader action. The defendant herein, disclaiming all interest in said moneys, tendered and offered to pay the full amount of the judgment, together with interest and costs, asking that all defendants therein be required to interplead their claims and rights, and on order of court duly made and entered on November 6, 1937, paid on the same date the said amount, to wit, $2,403.28 to the clerk of the court, subject to the order of the court in said interpleader action. The defendant herein, as plaintiff in said interpleader action, caused all of the defendants therein to be served with summons and complaint, except M. Kent, who was not served for the reason that neither his identity nor residence could be learned, and the defendant Harry Knight for the reason that process servers up to the present time have been unable to find him. On November 6, 1937, the superior court in said interpleader action issued an order to show cause and temporary restraining order wherein the clerk and the sheriff and M. Kent were restrained from issuing or serving any writs of execution on said judgment, and on November 22, 1937, issued a restraining order and preliminary injunction pending further order in said interpleader action, enjoining the sheriff and clerk from levying upon said judgment.

On November 23, 1937, M. Kent, through instrument signed by attorney A. Brigham Rose, appeared specially for the purpose of attacking the jurisdiction of the court in said interpleader action, and the court issued an order to show cause directed to the defendant herein requiring it to show cause why an order should not be made quashing and setting aside the order restraining the issuance of execution on said judgment. Upon the hearing of said order to show cause the court made an order on December 6, 1937, vacating the restraining order and injunction aforesaid. The effect of said order was to leave open to execution said judgment. Certain of the defendants have appeared in the interpleader action and made claim to the money deposited by the defendant as aforesaid. Certain of those appearing have set up judgments held by them against Harry Knight.

Immediately upon the entry of said order vacating said restraining order the defendant's counsel herein made diligent effort to protect defendant from being forced to pay much of the judgment twice. The defendant served and filed in said action on December 11, 1937, its notice of application for relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, together with points and authorities, affidavit in support of said application for relief, affidavit of merits, accompanied by a copy of the pleading proposed to be filed therein with affidavit in support thereof, which said pleading was for a stay of further proceedings. In said application defendant set forth in detail the matters and things alleged and referred to in the petition and asked that the entry of judgment be set aside and petitioner be allowed to file the pleading and affidavit proposed and accompanying the said application. This application was duly presented to the court on December 13, 1937, and on January 7, 1938, the application was denied. The defendant on January 12, 1938, served and filed its notice of appeal from said order denying said application for relief, and all steps have been taken to perfect said appeal.

The petitioner, the defendant, and his counsel have never been able to ascertain the identity or whereabouts of M. Kent, although they made and caused to be made due and diligent search therefor. Said Kent has never at any time appeared in person in the action or in the interpleader action, but has appeared only by attorney, and all negotiations with reference to said action have been conducted by Harry Knight and said attorney. At the trial of this cause Harry Knight appeared and sat at counsel table and consulted with said attorney and comported himself and gave all indication that he was the real party in interest in this cause. Cecelia Ayulard had no claim under the policy involved in this cause and at no time made any claim for any of the proceeds of said policy and executed an assignment to M. Kent for the purpose of quitclaiming and divorcing herself from any connection therewith. Petitioner alleges, and it is not satisfactorily denied, that M. Kent is either a nonexistent person, or an alias of Harry Knight, or is a nominal assignee of Harry Knight, and that Harry Knight is insolvent.

No specific provision is made in the law for a stay of execution of the judgment upon the appeal from the order made under section 473, as amended. The defendant must rely upon the inherent power of the court. He has been diligent and little harm will come to the plaintiff by the stay of execution, and the facts impel us to such an order.

Let an order issue restraining the execution on the said judgment until the final termination of the appeal from the order under section 473 of the Code of Civil Procedure, as amended, upon the defendant giving a bond running in favor of the plaintiff in the sum of $3,000, to be approved by a commissioner of the superior court.

We concur: WOOD, J.; McCOMB, J.

PEOPLE v. SIMPSON et al.*

Cr. 1616.

District Court of Appeal, Third District, California.

April 12, 1938.

Rehearing Granted April 26, 1938.

1. Larceny 🔑68(1)

In prosecution for grand theft by taking of 12 magnetos, effect and value of the evidence was for the jury. Pen.Code, § 484, as amended by St.1935, p. 2194.

2. Larceny 🔑65

Evidence *held* to justify conviction for grand theft on ground that 12 magnetos taken by the defendants were of value in excess of the sum of $200. Pen.Code, § 484, as amended by St.1935, p. 2194.

3. Criminal law 🔑1160

In prosecution for grand theft by taking of 12 magnetos, whether testimony as to value of magnetos of witnesses who had been handling magnetos and were familiar with their market value was overcome by testimony of witnesses who were simply engaged as employees in wrecking automobiles, and of one witness who had experience in handling magnetos, was for jury and trial court on determination of motion for new trial. Pen.Code, § 484, as amended by St. 1935, p. 2194.

4. Larceny 🔑46

In prosecution for grand theft by taking of 12 magnetos from tractors, admission of testimony relating to the cost of reinstalling the magnetos was error. Pen.Code, § 484, as amended by St.1935, p. 2194.

5. Larceny 🔑72

In prosecution for grand theft by taking of 12 magnetos from tractors, instruction that in determining the value of the property stolen the reasonable and fair market value thereof in the condition and in the place where it was at the moment such property was stolen was the proper test of its value, was proper. Pen.Code, § 484, as amended by St.1935, p. 2194.

6. Criminal law 🔑1169(2)

In prosecution for grand theft in taking of 12 magnetos from tractors, error in admission of testimony relating to cost of reinstalling magnetos was not reversible error, where testimony amply supported conclusion that property was worth more than $200, since testimony improperly admitted could not have been prejudicial. Pen.Code, § 484, as amended by St.1935, p. 2194; Const. art. 6, § 4½.

7. Criminal law 🔑823(17)

In prosecution for grand theft by taking of 12 magnetos from tractors, refusal of instruction to disregard testimony as to cost of reinstalling magnetos on tractors was not prejudicial error, where the court gave the jury a correct instruction as to determination of the value of the property. Pen. Code, § 484, as amended by St.1935, p. 2194; Const. art. 6, § 4½.

8. Criminal law 🔑1086(14)

Contention that district attorney committed error in his argument to jury was not available on appeal, where the record failed to show that the defendants took any exception thereto.

9. Criminal law 🔑1171(1)

In prosecution for grand theft by taking of 12 magnetos from tractors, error, if any, in argument of district attorney which referred to cost of installation of magnetos was not prejudicial, where evidence was sufficient to justify the verdict fixing the value of the magnetos in excess of $200.

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*For subsequent opinion see 79 P.2d 119.

Pen.Code, § 484, as amended by St.1935, p. 2194; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Willard Simpson and Sidney Simpson were convicted of grand theft, and they appeal.

Affirmed.

John R. Cronin, of Stockton, for appellants.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and F. C. Clowdsley, Dist. Atty., and Maxwell M. Willens, Deputy Dist. Atty., both of Stockton, for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 20th day of December, 1937, the district attorney of the county of San Joaquin filed an information charging the defendants with the crime of grand theft, in that they did, in said county, steal and carry away twelve magnetos of the value of $300, lawful money of the United States, the personal property of the California Tractor & Equipment Corporation. Upon the trial following the filing of said information the defendants were found guilty as charged, to wit, of a felony, in that the property stolen was over the value of $200.

Upon this appeal it is urged that the value of the property was not of the sum of $200, lawful money of the United States, but was of a lesser value, and that the defendants should have been convicted of the crime of petit larceny, rather than of the crime of grand theft, which would have resulted in a sentence to the county jail instead of to state prison.

It is also urged as a ground for reversal that the court committed prejudicial error in permitting some evidence to be introduced as to the cost of reinstalling the magnetos upon the machines from which they were taken.

A motion was made for a new trial after the rendition of the verdict on the grounds that the evidence was not sufficient to sustain the verdict. This motion, after consideration by the trial court, was denied, and sentence pronounced upon the defendants.

The principal contention made by the appellants is to the effect that the property is not shown to have been of the value of $200. An examination of the record shows that the People called five witnesses, all of whom testified that the value of the magnetos was considerably in excess of the sum of $200; the values being placed by the different witnesses at from $25 to $40 apiece, depending upon the character and manufacture of the various magnetos, some of which were of American manufacture and some of German manufacture.

The defendants, for the purpose of controverting the People's witnesses as to the value of the magnetos, called five witnesses. These witnesses testified that the value of the twelve magnetos was less than the sum of $200.

An examination of the qualifications of the various witnesses shows that the witnesses called by the People were engaged in a business which gave them an understanding of the value of magnetos, while the evidence on the part of the defendants, with the exception of one, showed that they were simply employees of wrecking companies, and were not engaged in a line of business which would give them knowledge of the value of magnetos.

Mr. C. B. Rohn, the owner and manager of the California Tractor & Equipment Corporation, after describing the various magnetos, and where they were manufactured, testified that the American magnetos were worth at least $25 apiece, and the Robert Bosch magnetos were worth $35 apiece; that the six-cylinder Bosch magnetos were worth $35 apiece; that the "I. H. C." magneto is worth $35. A calculation of this testimony fixes the value of the twelve magnetos much in excess of $200. The testimony of Mr. Rohn also shows that they were in a usable condition. This witness later testified as to what it would cost to replace the magnetos upon the machines from which they were taken. This testimony we will consider later on. Mr. Rohn also testified that he had been familiar with the value of magnetos and handled machines so equipped for a number of years. A witness by the name of Neil Guyman testified to the same effect.

Mr. Boyce, a witness for the plaintiff, testified that he had been handling magnetos and repairing the same for about ten years; that he had been in the employ of a Mr. Grimsley during that time, and was familiar with the different kinds of magnetos. His testimony was to the effect that they would range in value from $20 to $35 apiece, depending upon their manufacture. His testimony was to the effect, also, that he was familiar with the market price.

A witness by the name of Cooper testified that he had been engaged in business for about five years, which gave him knowledge of the value of magnetos; that he was familiar with the market value thereof; and that the value of the magnetos in question would range from $20 to $35, depending upon where the same were manufactured.

A witness by the name of Grissel testified that he had been in business for nineteen years; that he was the proprietor of a tractor company, and was familiar with the value of magnetos. This witness placed the value from $25 to $40, depending upon the manufacture; the greatest value being placed upon the German Bosch magnetos. We may here add that the magnetos taken were taken from the tractors.

[1-3] It was for the jury to determine the effect and value of the evidence upon which they were called upon to pass, and if they believed the testimony to which we have referred, there is abundant evidence in the record to establish the market value of the twelve magnetos much in excess of the sum of $200. It was for the jury to determine whether witnesses who had been handling magnetos and who were familiar with the market value thereof, was in any way overcome by the testimony of witnesses who were simply engaged as employees in wrecking automobiles.

As to the testimony of the one witness who had had some experience in handling magnetos, it was likewise for the jury to determine whether his testimony bore the stamp of credence, or whether it was of such a nature as not to militate against the testimony of the witnesses to which we have referred. Likewise, it was a question for the trial court to determine upon the motion for a new trial.

[4, 5] Section 484 of the Penal Code, as amended by St.1935, p. 2194 specifies that in determining the value of the property taken, the reasonable and fair market value shall be the test. As to the testimony relating to the cost of reinstalling the magnetos, we are of the opinion that the court was in error in admitting such testimony. However, an instruction given by the court clearly shows the basis upon which the jury should determine the value of the property. That instruction is in the following words: "You are instructed, for the purpose of this case, in determining the value of the property stolen, if it has been stolen, the reasonable and fair market value thereof, in the condition and in the place where it was at the moment such property was stolen, is the proper test of its value." This instruction is based upon the case of People v. Ciani, 104 Cal.App. 596, 286 P. 459. We do not need to quote from this latter opinion, but just simply refer to it and to the authorities there cited, as amply supporting the instruction given by the court in this case.

[6] There being testimony amply sufficient to support the conclusion of the jury that the property was worth more than $200, the testimony to the effect that it would cost so much to reinstall the magnetos could not be prejudicial, and thus the provisions of section 4½ of article 6 of the Constitution applies, and we would not be warranted in reversing the judgment of the trial court on account of the admission of such testimony.

[7] The defendants did ask the court to give an instruction to disregard the testimony as to the cost of reinstalling the magnetos. This requested instruction was denied, and is assigned as prejudicial error. In view of the fact that the court gave the jury a correct instruction as to how they should determine the value of the property, limited to the fair market value thereof, we think that no prejudice resulted from refusing to give an instruction relative to excluded testimony as to the cost of reinstallation of the magnetos.

[8, 9] It further appears that the district attorney in his argument to the jury did refer to the cost of installation. However, the record fails to show that the defendants took any exception to the arguments of the district attorney. No question is raised as to the fact of the defendants having stolen the twelve magnetos, and from what we have set forth, we think there is sufficient testimony in the record to justify the verdict of the jury, and that the defendants have suffered no prejudice by reason of any errors committed by the trial court.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 706

JAEKLE et al. v. HALTON et al.

Civ. 5676.

District Court of Appeal, Third District, California.

April 14, 1938.

1. Mechanics' liens ⇨115(1)

Owners paying contractor for subcontractors' millwork without receiving subcontractors' receipted bill, as required by building contract, could not assert that receipted bill which subcontractors subsequently gave the contractor estopped subcontractors from claiming a lien when contractor failed to pay subcontractors, where owners received notice that contractor refused to pay subcontractors on the same day that subcontractors gave receipt to contractor.

2. Mechanics' liens ⇨209

A materialman may waive his statutory right to a lien by conduct which is prejudicial to the equitable rights of others. Code Civ.Proc. § 1202.

3. Mechanics' liens ⇨115(1)

Subcontractors' delivery of receipt to contractor prior to contractor's payment of amount due subcontractors, and subcontractors' failure for almost a month to notify owners of the dishonor of contractor's check for amount due subcontractors, estopped subcontractors from asserting mechanic's lien, where owners paid contractor for subcontractors' millwork after receiving subcontractors' receipted bill as provided in building contract.

Appeal from Superior Court, Napa County; W. T. O'Donnell, Judge.

Suit to foreclose mechanic's lien for materials by Fred W. Jaekle and another, doing business under the firm name and style of "Corlett Planing Mill Company and Jaekle Brothers," a copartnership, against Edward H. Halton and others. From the judgment, the plaintiffs appeal.

Affirmed as modified.

Nathan F. Coombs, of Napa, for appellants.

King & King, of Napa, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

In a suit to foreclose a mechanic's lien for materials supplied for two separate buildings on the same property, it was held the lien was waived by conduct which created an equitable estoppel. The claim of lien is for millwork used in constructing two separate buildings simultaneously on the same property under different contracts. A receipted bill for $525 for materials used in the bungalow constructed under the first contract was presented by the contractor to the owners of the property. Relying on that receipt the owners paid the contractor in full. The contractor appropriated the money and drew his personal check in favor of the plaintiffs in payment of the bill. His check was dishonored. The plaintiffs have not been paid. Without notice or knowledge of the dishonoring of the contractor's fictitious check, the owners subsequently paid all claims to which the contractor was entitled. The lien for that amount was disallowed on the ground of equitable estoppel.

Regarding a claim of lien to secure payment of another bill for millwork used in constructing the separate guesthouse under a subsequent oral agreement, the owners paid the contractor the further sum of $249.50 without a receipted bill from plaintiffs. That money was also appropriated by the contractor, who drew his personal check in favor of the plaintiffs in payment thereof, which check was likewise dishonored. But the owners had notice on the same day of the dishonoring of this second check. The owners did not make subsequent payments to the contractor, relying upon a receipted bill for this amount. The court, however, found that this claim was also barred by conduct amounting to an equitable estoppel.

The defendants, Edward H. Halton and wife, own an acre of land at Coombsville in Napa county. May 14, 1931, they contracted in writing with the defendant Warren E. Younger to build a bungalow on that land for the agreed price of $3,750. The contract provides that payments for materials should be made to the contractor only upon receipted bills therefor. A few days later an oral agreement was made with the same contractor to construct an additional guesthouse on the same property under similar terms and conditions. Both buildings were built at the same time. The plaintiff furnished all the millwork for both structures. The millwork for the bungalow amounted to $525. The millwork for the guesthouse came to $249.50

additional. June 24th the contractor, Younger, presented to the owners of the land the bill for millwork on the bungalow for $525, indorsed by the plaintiffs as paid in full. The following day Edward H. Halton gave Younger his check covering that bill, which was cashed by Younger that same day. June 30th Younger presented to the owners of the buildings the plaintiffs' bill for millwork on the guesthouse for the additional sum of $249.50. This bill was not then receipted, but it was nevertheless paid to the contractor by the owners. This money was also appropriated by the contractor, who drew his personal check for that amount in favor of the plaintiffs on July 22d. This check was also dishonored on the following day. At the time Younger drew his second fictitious check in favor of the plaintiffs they indorsed that bill as paid in full. That receipted bill was presented to the owners on the last-mentioned date. But on that day the owners were notified of the refusal to pay Younger's last check. With respect to the claim of lien for the millwork on the guesthouse for the sum of $249.50, the owners did not make subsequent payments, relying on that receipted bill. At the time of receiving notice of the dishonoring of the last Younger check on July 22d, the owners had paid all bills accruing under the contracts for both houses, except the sum of $400 due to other materialmen for obligations already incurred. The last-mentioned bills were afterward paid.

Mr. Halton testified positively that he supposed both bills for millwork had been paid by Younger to the plaintiffs, and that he had no knowledge to the contrary until he was notified of the dishonoring of the Younger checks on July 22d; that he paid Younger the first check for millwork in the sum of $525, relying on the bill receipted by plaintiffs, including that amount, which was then delivered to the owners and retained by them; that believing plaintiffs were fully paid for that work, the owners thereafter, and prior to July 22d, paid to Younger and other claimants all sums of money to which they were entitled under the contract, except as hereinbefore stated; that on June 24th, when the first claim for millwork was paid to Younger, he was then entitled to approximately $800, which was paid to him before the owners had notice of the dishonoring of his checks.

July 24, 1931, notices of the completion of the buildings were recorded by the owners in the office of the county recorder of Napa county, as provided by law. August 19, 1931, within the thirty days' limitation prescribed by section 1187 of the Code of Civil Procedure, plaintiffs filed their notice of claim of lien in due form. This suit was then commenced. The owners of the buildings pleaded, and the court found, that plaintiffs by their conduct waived their right to liens for materials furnished, and that they were estopped from asserting liens by prematurely receipting the bills as fully paid, and by failure to notify the owners regarding the fictitious checks until all of the money due pursuant to the contract had been fully paid or the bills therefor incurred. From the judgment which was rendered accordingly, the plaintiffs have appealed.

The only questions presented on appeal are whether a materialman may waive his claim of lien by conduct amounting to an estoppel in pais, and whether the facts of this case support the findings that they did so forfeit their right to a lien.

Plaintiffs' bill for millwork furnished on the first contract for the bungalow was presented to Mr. Halton by Younger, the contractor, June 25, 1931. Edward H. Halton drew his check on that date in favor of Younger for the full amount of that bill. That check was immediately cashed by Younger. On June 29th, Younger drew his personal check in favor of plaintiffs for $525, the full amount of that bill. The plaintiffs presented that check to the bank for payment the following day. Payment of Younger's check was refused for the reason that he had no funds on deposit in the bank. When Younger gave plaintiffs his check for $525 in payment of their bill for millwork on the bungalow they receipted their bill as paid in full on that date, June 29th. That receipted bill was immediately delivered to Mr. Halton, who assumed it was in satisfaction of that entire transaction. There appears to be some conflict of evidence regarding notice to the owners of the building of the dishonoring of Younger's check. The court, however, found that the owners had no knowledge of that fact until July 22d, prior to which time they had paid the contractor all the money he was entitled to receive under the contract. During that interval, without knowledge of the dishonoring of the Younger check, the owners paid to him the further sum of about $800. After acquiring that knowledge the owners did pay some $400 to other subcontractors for bills previously incurred.

The finding of the court to the effect that the owners had no knowledge of the dishonoring of Younger's check until July 22d is adequately supported by the evidence. Mr. Halton testified positively to that fact. Mr. Fred Jaekle, one of the plaintiffs, testified in that regard:

"The Court: But it is a fact, Mr. Jaekle, that several days elapsed from the time you were notified that the check was not honored by the bank before you got in touch with Mr. Halton at all?

"The Witness: Your Honor, I done that for the reason I thought, as I say, there would be some money come in perhaps. * * *

"The Court: But, of course, the fact is, that during the time that elapsed from when you found out that the check was not honored up to the time that you took it up with Mr. Halton, you knew during that interim that Mr. Halton was oblivious of the nonpayment of the bill, while he held a receipted bill, and he was in that situation of holding that receipted bill during that period of time?

"The Witness: Well, of course, Your Honor, also I figured I was protected under the law. There hadn't been any notice of completion filed and I thought that I had at least that much grace. * * *

"Mr. King: Q. In other words, you thought you could make him pay twice?

"The Witness: No, I didn't."

[1] With respect to the payment of the separate bill for millwork amounting to the sum of $249.50, furnished under a subsequent contract to build the guesthouse, it appears that the owners of the property were not misled or deceived by a receipt for that amount signed by plaintiffs. No such receipt was procured or presented until the owners were notified of Younger's default. It follows that the lien upon the second building, to secure the payment of that $249.50 bill, was not waived by conduct on the part of the plaintiffs amounting to an equitable estoppel. The facts with respect to that claim of lien are these: That bill of $249.50 was presented to the owners June 30, 1931. It was not then receipted by plaintiffs. It will be recalled the contract provided that claims were to be payable to the contractor by the owners only upon presentation of "receipted bills." In spite of that fact, Mrs. Halton drew her check on June 30th in favor of Younger for payment of that bill. We have hunted in vain for evidence of the date when Younger drew his fictitious check in favor of plaintiffs for that amount. Neither party has pointed us to evidence in that regard. But it does appear that the bill for that millwork, in the sum of $249.50, was not receipted by plaintiffs until July 22d. That bill contains this indorsement: "Received payment, 7—22—31, Jaekle Bros By J. C. Conkright." That is the very day Mr. Halton admits that he had notice of the dishonoring of the Younger checks. It thus appears, without conflict, that the owners were not deceived by the receipted bill of the plaintiffs for that amount of $249.50, nor by any other conduct which would create an estoppel with respect to that claim of lien.

We are therefore of the opinion the lien was erroneously denied with respect to the last-mentioned item for materials furnished under the separate contract in constructing the guesthouse. The lien was properly denied as to the bill for materials amounting to $525, supplied in constructing the bungalow under the original written contract.

[2] A materialman may waive his statutory right to a lien by conduct which is prejudicial to the equitable rights of others. Section 1202, Code Civ.Proc.; 40 C.J. 324, § 430; 18 R.C.L. 962, sec. 104; Washburn v. Kahler, 97 Cal. 58, 31 P. 741; Botzum Bros. Co. v. Brandau, 20 Ohio App. 508, 152 N.E. 727, 729. In 40 Corpus Juris, at page 325, it is said: "A person entitled to a mechanic's lien may be estopped to assert or enforce it in equity by any act which will render it inequitable for him to do so."

In 18 Ruling Case Law, at page 962, it is likewise said: "The right of a person to assert and perfect a mechanic's lien is a statutory privilege which he may exercise or not, at his pleasure, and a waiver of such right may be inferred from circumstances. * * * The waiver must, however, arise from the consent, express or implied, of the person who would otherwise be entitled to the lien, or else from such a line of conduct as has estopped him from asserting it."

In the Botzum Case, supra, the Ohio Court of Appeals, upon facts very similar to those of the present case, regarding the waiver of a lien for $525 on the original contract, held that various lien claimants were estopped from asserting liens against property for the payment of materials furnished. In that case the owner of the property paid the contractor the balance due for the construction of the building upon presentation to him by the contractor of receipted bills for materials from all the remaining lien claimants. A few days later the contractor gave to each claimant a personal check for his proportion of that sum. The checks were drawn upon a bank where the contractor had no money deposited. He then absconded. The owner of the property knew nothing of the fictitious checks until all bills had been paid. The owner was deceived by the presentation of these receipted bills and was thereby led to believe that the lien claimants had been fully paid. The court held that the conduct of the lien claimants who furnished the contractor with false written receipts for their bills for materials which enabled the contractor to defraud the owner of the building created an equitable estoppel barring them from thereafter asserting their liens. The court says in that regard: "It is clear that one who has executed a written waiver of lien, or a written release, which has been acted on by the owner, and the money disbursed by him in the exercise of ordinary care in reliance thereon, would be precluded from securing a lien."

In support of that doctrine the Ohio court cited cases from Missouri, Utah, and Michigan which, in effect, hold that materialmen who execute fictitious receipts showing payment of their claims in full, which are accepted by the owners as true, and in reliance upon which, in the exercise of due care, the owners subsequently pay to the contractors all the money they are entitled to under the contracts thereby waive their liens. These cases appear to be founded upon sound equitable principle.

[3] In the present case, with respect to the lien for $525, except for the fact that the plaintiffs falsely acknowledged by their receipted bills that they had been paid in full, the owners would have withheld payments due the contractor sufficient in amount to cover the cost of that millwork, but which the owners in good faith, without knowledge of the contractor's fraud, subsequently paid to him. The plaintiffs' premature receipt of their $525 bill for materials used in the construction of the bungalow, and their negligence in promptly notifying the owners of the dishonoring of Younger's check, created an equitable estoppel, under the circumstances of this case, precluding them from asserting their claim of lien with respect to that bill. Every necessary element constituting an estoppel in pais is present. The findings of the court with respect to the waiver of plaintiffs' claim for $525 are adequately supported by the evidence.

The plaintiffs' lien to secure payment of their separate claim for materials furnished for the guesthouse in the sum of $249.50 was erroneously disallowed.

The judgment is accordingly modified so as to allow plaintiffs a lien against the property described in the complaint to secure payment of their claim of $249.50 and interest at the rate of 7 per cent. per annum, as prayed for, and providing for the foreclosure of that lien to satisfy the judgment for that amount. As so modified, the judgment is affirmed. The appellants may recover their costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

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25 Cal.App.2d 714

GRIGSBY v. HAGLER et al.

Civ. 1870.

District Court of Appeal, Fourth District, California.

April 14, 1938.

1. Principal and agent 🔑158, 159(1)

Under statute governing principal's responsibility for agent's negligence or omission, principal is liable to third party not only for negligence of agent in transaction of business of agency, but also for frauds or other wrongful acts committed by agent in and as a part of the transaction of such business. Civ.Code, § 2338.

2. Principal and agent 🔑158

Under statute governing principal's responsibility for agent's negligence or omission, beverage wholesaler was liable to his customer for fraud of his agent, who was authorized to deliver beverages to customer by truck, make collections, and report collections on sales slips, but who made excessive collections under erroneous copies of sales slips and gave correct amount of collections and original sales slips, which did not show excessive collections, to wholesaler, notwithstanding that wholesaler did not know of agent's fraud. Civ.Code, § 2338.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action for fraud by H. P. Grigsby against Clyde Hagler, doing business under the fictitious name and style of Hanford Wholesale Beverage Company, and another. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Roger R. Walch, of Hanford, for appellant.

Wild, Everts & Carlson and R. H. Reeve, all of Fresno, and Arthur L. Blank, of Coalinga, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for damages alleged to have been suffered by the plaintiff as a result of frauds practiced by the defendant Belli.

The facts are not disputed and it was stipulated that the plaintiff had been damaged in the sum of $731. The defendant Hagler was engaged in the wholesale beverage business and the defendant Belli was in his employ. Belli was furnished with a motor truck and sales pad and was authorized to make deliveries of beverages to customers of Hagler and to collect moneys due for products sold to them. The plaintiff was one of these customers and Belli regularly made collections from him. The collections were based upon the number of empty kegs and he was supposed to make out a sales slip, in triplicate, in an amount corresponding with the empties. Instead of doing this he placed a cardboard between the original and the copies and made out the original for the correct amount and the copies for a greater amount than was actually due. He collected from Grigsby upon the copies, turned in the original or correct slip to his employer with the amount of money corresponding thereto, and pocketed the difference. This went on for some months before it was discovered. It is conceded that Hagler had no knowledge of these practices, that he had never authorized such a course of conduct, and that he received none of the excess moneys collected.

The court found that these acts were done by the defendant while acting in the scope of his employment and in connection with the execution of the duties imposed by his agency. Judgment was entered against both defendants, and the defendant Hagler has appealed.

The appellant contends that these wrongful acts committed by his agent were not within the scope of the employment. He relies on such cases as Miller v. Citizens' Nat. Trust, etc., Bank, 1 Cal.App.2d 470, 36 P.2d 1088; Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L.R.A. 697; Copelin v. Berlin Dye Works, etc., Co., 168 Cal. 715, 144 P. 961, L.R.A.1915C, 712; Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 P. 234, 15 L.R.A. 475, 27 Am.St.Rep. 223; and Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659, 65 L.R.A. 88, 100 Am.St.Rep. 154. Those cases are not controlling here since it appears in each of them that the wrongful act in question was one entirely unrelated to the purpose of the agency or was one committed independently of the transaction of any of the principal's business.

[1] It is well settled in this state that a principal is liable to third parties not only for the negligence of his agent in the transaction of the business of the agency but also for the frauds or other wrongful acts committed by such agent in and as a part of the transaction of such business. Civ. Code, § 2338; Bank of California v. W. U. Tel. Co., 52 Cal. 280; Johnson v. Monson, 183 Cal. 149, 190 P. 635; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 P. 704, 41 L.R.A.,N.S., 529; Muehlebach v. Paso Robles S. Hotel, 65 Cal.App. 634, 225 P. 19. In other jurisdictions liability has been imposed upon the principal under circumstances quite similar to those here involved. New England Mut. Life Ins. Co. v. Swain, 100 Md. 558, 60 A. 469; Jones v. Sherwood Co., 150 Md. 24, 132 A. 278; Cleaney v. Parker, 167 Ala. 134, 51 So. 951, 140 Am. St.Rep. 21; Birkett v. Postal Telegraph Cable Co., 107 App.Div. 115, 94 N.Y.S. 918; Berkovitz v. Morton-Gregson Co., 112 Neb. 154, 198 N.W. 868, 33 A.L.R. 85.

[2] Belli was authorized to make these collections, and each was made in the regular course of the employer's business and

in connection with an actual delivery and sale. The only variance from the authorized course of procedure was that the amounts due were misrepresented and sums in excess of the correct amounts were collected. He was able to commit these frauds only because of his possession of the truck and sales pad and because of the fact that he was regularly carrying on this part of his employer's business. In committing these wrongful acts he did not step aside from the business of his employer but he used that business as a means to accomplish the fraud which was directly connected therewith. Although he exceeded his authority he was not acting without the scope of his employment, and the facts bring this case within the liability imposed upon an employer by section 2338 of the Civil Code.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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25 Cal.App.2d 627

OLSON v. UNION OIL CO. OF CALIFORNIA et al.

Civ. 10583.

District Court of Appeal, First District, Division 2, California.

April 7, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Automobiles 🔑246(20)

In guest's action for injuries sustained when automobile in which she was riding collided with defendant's truck at intersection, instruction that speed of any vehicle not in excess of limit specified is lawful unless "clearly proved" to be at a speed that is greater than is reasonable and prudent was not erroneous as stating provisions of statute enacted after accident, though instruction was similar to statute, in that both contained quoted phrase. Gen.Laws 1931, Act 5128, § 113(a); St.1935, p. 176, § 511.

2. Trial 🔑237(1)

In guest's action for injuries, instruction that by "preponderance of evidence" is meant such evidence as when weighed with that opposed to it has more convincing force was not contradictory to instruction that speed of any vehicle not in excess of limit specified is lawful unless "clearly proved" to be a speed that is greater than reasonable and prudent, since the words "clearly proved" are to be understood as meaning the "preponderance of the evidence." Gen. Laws 1931, Act 5128, § 113(a); St.1935, p. 176, § 511.

[Ed. Note.—For other definitions of "Clearly Proven" and "Preponderance," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action for injuries sustained in an automobile accident by Linnea Olson against the Union Oil Company of California, a corporation, and others. From a judgment on the verdict for defendants, plaintiff appeals.

Affirmed.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover damages for injuries sustained in an automobile accident the jury returned a verdict in favor of the defendants. From the judgment entered on that verdict the plaintiff appealed.

In her brief she presents one point: The trial court gave an erroneous instruction. The effect of giving that instruction involves a consideration of the following facts.

At about 5 p. m. on February 23, 1935, George Messer was driving his car, a Maxwell sedan, east on the south side of Grove street in San Francisco. The plaintiff was riding as his guest and was seated on his right in the front seat. Albert Young was also a passenger. He was seated in the rear seat. At the same time G. J. Eisenzopf was driving a truck, owned by the Union Oil Company, on the west side of Polk street in a southerly direction. The plaintiff contended that at a low speed of 15 miles per hour the Maxwell approached the intersection of the two streets, entered it, and on reaching about the middle of Polk street the defendants drove the truck at a high speed of 25 to 30 miles per hour down from the north into and across the intersection, struck the

Maxwell car, and injured her. The defendants contended that at no time was the truck driven at, and by reason of a governor attached it could not be driven at, a speed in excess of 18 to 20 miles per hour; that it entered the intersection at a speed not to exceed 15 miles per hour; reduced to a speed of not more than 10 miles per hour; proceeded across the middle line of Grove street; and was about to leave the intersection when the Maxwell car approached from the west at a speed twice as fast as the truck was traveling, swerved to the right in an attempt to cross in front of the truck, but, in so attempting to pass in front of the truck, it was hit by the latter. The Maxwell was hit by the right front bumper of the truck on its left rear door. The Maxwell swerved in a circle, its right rear wheel was torn off, and it came to a stop about five feet in front of the truck. The latter stopped almost in its tracks after the collision. At the time of the impact the Maxwell car had crossed the west line of Polk street and had entered it a very few feet and was about on the south curb line of Grove street if that line is projected across Polk street. The plaintiff and Mr. Young testified as eyewitnesses for the plaintiff. Mr. Young testified that the truck traveled 30 miles per hour on approaching the intersection and so proceeded without slowing down. But the plaintiff did not controvert the sworn evidence that the truck was equipped with a governor in good working order, and that the truck could not travel faster than 18 or 20 miles per hour. Moreover, Eisenzopf, its driver, and two bystanders, Edwards and O'Dowd, who saw the accident, all testified that the truck was traveling at about 15 miles per hour, and that the Maxwell car was traveling twice as fast.

The plaintiff and Mr. Young both testified that their car was the first to enter the intersection. All other witnesses testified that it was not, that the truck was the first to enter. All of the physical facts—the positions of the cars after they came to a stop, the skid marks made by the Maxwell car, and the spaces and distances—tend to controvert the plaintiff and to sustain the contentions of the defendants. Those physical facts are not controverted. They are shown in two photographs which were taken almost immediately after the accident and before either the Maxwell car or the truck had been moved.

[1, 2] The jury was very fully and completely instructed. Instructions 25, 27, 32, 34, and 38 were addressed to the rule set forth in subdivision (a), § 113, California Vehicle Act, 2 Deering's Gen.Laws 1931, Act 5128, p. 2506. It is not contended that any one of those instructions is an erroneous statement of the law. Instruction No. 16 was as follows: "Now, we have said this is a civil case, and we have seen the nature of it, and in civil cases, the preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force." But the plaintiff complains of instruction No. 39. She claims it was as follows: "However, the speed of any vehicle upon a highway not in excess of the limits specified in this section, is lawful unless clearly proved to be in violation of this rule, towit: at a speed that is greater than is reasonable and prudent and a speed which would endanger the safety of persons and property." The plaintiff asserts the instruction was a statement of the provisions of section 511 of the Vehicle Code, Stats. 1935, c. 27, as amended, p. 176, and she calls attention to the fact that said statute did not take effect until September 15, 1935—over seven months after the date of the accident. A comparison of the instruction with section 511 of the Vehicle Code discloses that the former is not a copy of the latter, but both do contain the phrase "clearly proved." She also asserts that said phrase is equivalent to a statement "to prove beyond a reasonable doubt." People v. Wreden, 59 Cal. 392, 394. An examination of that case discloses that the instructions there under consideration did not contain the words "clearly proved." Again, she claims that instruction No. 16 and instruction No. 39 were contradictory. That claim may not be sustained as it has been directly held to the contrary. Estate of Janvier, 7 Cal.App.2d 624, 626, 46 P. 2d 792. There are many decisions in civil actions in which the words "clearly proved" are used. But when they are so used they are to be understood as meaning the preponderance of the evidence. Edmonds v. H. W. Wilcox, 178 Cal. 222, 224, 172 P. 1101; Steinberger v. Young, 175 Cal. 81, 84, 85, 165 P. 432; Treadwell v. Nickel, 194 Cal. 243, 260, 228 P. 25; Hanscom v. Drullard, 79 Cal. 234, 236, 21 P. 736; Estate of Janvier, supra; Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 630,

61 P.2d 83. All of the last three cases involved a consideration of instructions and applied the rule succinctly stated in Treadwell v. Nickel, supra.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

25 Cal.App.2d 671

SMITH v. DEAN et al.

Civ. 11397.

District Court of Appeal, Second District, Division 1, California.

April 13, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Trial ⇨48

In employee's action for breach of employment contract, admission of prior employment contract for purpose of emphasizing significance of, as well as proving, manner in which parties had treated and acted upon clause appearing in both contracts, was not error on ground that prior contract allegedly inferentially reflected discredit upon employers, since evidence admissible for one purpose cannot be excluded because it does not satisfy rules applicable to it in some other respect.

2. Appeal and error ⇨1053(2)

In employee's action for breach of employment contract, a prior employment contract containing clause identical with that contained in subsequent contract was not inadmissible because prior contract allegedly reflected discredit upon employers, where employers' instruction advised jury that employers' character was not in issue and that such evidence was not to be considered in respect to any personal characteristic of employers.

3. Trial ⇨295(1)

Instructions were not erroneous where, taken as a whole, they fairly and adequately presented matters upon which it was proper for court to advise the jury.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by J. S. Smith against Charles A. Dean and another, doing business as the Dean Oil Tool Company, to recover damages for breach of an employment contract. From a judgment for plaintiff, defendants appeal.

Affirmed.

Brittan & Mack, of Bakersfield, and J. R. Girling, of Los Angeles, for appellants.

Hanna & Morton and James M. McRoberts, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in an action for damages for breach of a contract of employment.

Appellants were engaged in the business of renting tools and supplying service in connection with and for the purpose of drilling oil wells. In February of 1934, plaintiff and respondent was employed by appellants as sales agent. The agreement of employment, which was reduced to writing and signed by the parties, provided in part as follows: "1. This contract is to be in effect from September 1, 1934, to February 1, 1936, and it is hereby further agreed that (plaintiff) has the option to continue this contract, as accepted herein, for an additional period of two years, at the time of the expiration of the period herein provided for if he so elects, and (plaintiff) shall notify (defendants) of his election to so continue."

On January 7, 1936, plaintiff received a letter from defendants containing, in part, the following: "* * * we will not renew our sales contract when it expires on February 1st, 1936. We are making other plans for the soliciting of our business."

Upon the alleged wrongful discharge, plaintiff brought suit to recover damages. The complaint was in two causes of action, the first of which was for general damages for wrongful discharge, and the second for unpaid commissions alleged to be due. The case was tried before the court with a jury, which returned a verdict for the plaintiff on both causes of action.

The appeal is presented on the judgment roll and a bill of exceptions containing part of the evidence.

The sufficiency of the evidence to sustain the verdict is not questioned.

[1,2] Appellants contend, among other things, that the admissibility in evidence of

a certain contract which is referred to as the "original" contract, was prejudicial. It appears from the record that respondent had worked for appellants since December 1, 1933; that thereafter, namely on February 1, 1934, the parties executed a contract of employment, which was later superseded, by the contract sued upon herein. The original contract was offered in evidence by plaintiff, apparently for the purpose of emphasizing the significance of, as well as for the purpose of proving, the manner in which both parties had treated and acted upon a certain clause in the original contract, which clause appeared in the second contract in identical terms. Appellants complain that because the original contract, in certain other portions thereof, inferentially reflected discredit upon appellants, it should have been excluded. Assuming, but by no means conceding, that said original contract had such effect, nevertheless, it was properly admitted. It is well settled that evidence admissible for one purpose cannot be excluded because it does not satisfy the rules applicable to it in some other respect. 10 Cal.Jur., p. 816. Moreover, defendants' instruction No. 19 advised the jury that Mr. Dean's character was not in issue and that such evidence was not to be considered "in respect to any personal characteristic of Mr. Dean."

[3] It is further contended, quoting from appellants' brief, that, "It is error to instruct a jury upon principles of law which tend to confuse them and are based upon inferences and presumptions contrary to the law." The answer alleged, and defendants sought to prove, that the discharge of plaintiff was justified because the contract of employment had been violated by plaintiff in several particulars, in addition to which, although not alleged, defendants sought to prove that plaintiff had failed to make certain reports required by the contract in question. Rebuttal testimony was offered by the plaintiff on the same subjects. Appellants complain about four instructions given by the court with regard to the above-mentioned defenses, and in particular urge that each instruction "tended to indicate an opinion on the part of the court as to a fact in issue before the jury." With regard to one other instruction about which appellants complain, it is urged that the jury was limited in its consideration of the right of defendants to discharge the plaintiff. Although relatively brief, it will serve no useful purpose to recite the instructions above referred to. Taken as a whole, the instructions fairly and adequately presented the matters upon which it was proper for the court to advise the jury. Even when considered separately, the particular instructions about which appellants complain do not appear to be capable of the tendencies imputed to them by appellants. Such last-mentioned instructions are in accord with the facts and the law and indicate no opinion on the part of the court as to any fact in issue.

There are no prejudicial errors in the record.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

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26 Cal.App.2d 426

AMERICAN TRUST CO. v. DIXON et al.

Civ. 10732.

District Court of Appeal, First District,
Division 2, California.

April 18, 1938.

As Modified on Denial of Rehearing
May 18, 1938.

1. Appeal and error 🔑**80(4), 870(2)**

An interlocutory decree declaring that trustee was an involuntary trustee and requiring him to account for trust property was not appealable, but was reviewable upon appeal from final decree that declaration of trust and amendment thereto were void. Code Civ.Proc. §§ 956, 963.

2. Trusts 🔑**46**

A settlor of trust was presumed to have been of sound mind at all times, and settlor's daughter and adopted grandson seeking to set aside declaration of trust and amendment thereto had burden of showing affirmatively by a preponderance of the evidence that settlor was of unsound mind at time of execution of declaration and amendment.

3. Evidence 🔑**568(2), 571(2)**

While both expert and nonexpert witnesses can express opinions on issue of competency of settlor of trust, it is not the abstract opinions but the reasons given in support thereof which are of importance.

4. Trusts ⚷**46**

A delusion does not of itself necessarily render incompetent the settlor of a trust.

5. Trusts ⚷**46**

Evidence *held* insufficient to warrant cancellation of declaration of trust and amendment thereto on ground that settlor was of unsound mind or suffered delusions at the time of the execution of the declaration and amendment.

6. Trusts ⚷**46**

A settlor's belief that daughter and adopted grandson were improvident in the use of money was not an insane delusion which would warrant cancellation of declaration of trust and amendment thereto providing that daughter and grandson should receive entire income of trust estate but could not touch corpus thereof, whether settlor's belief was rational or mistaken.

◆

Appeal from Superior Court, Contra Costa County; A. J. Caminetti, Jr., Judge.

Action for declaratory relief by the American Trust Company, trustee, against Edith May Dixon, Melvin E. Shreder, and another wherein the named defendants filed a cross-complaint to set aside declaration of trust and amendment thereto. From an interlocutory decree and the final decree, the plaintiff appeals.

Reversed with directions.

Edmund de Freitas and A. J. Woolsey, both of Oakland, and Cushing & Cushing and Delger Trowbridge, all of San Francisco, for appellant.

Dunn, White & Aiken and Carlos G. White, all of Oakland, for respondents.

SPENCE, Justice.

Plaintiff was named as trustee under a declaration of trust made by Margaret M. Higgins, now deceased, dated October 2, 1931, and an amendment thereto dated November 23, 1931. This action was originally brought by plaintiff to obtain declaratory relief. Defendant Edith May Dixon, the daughter of the deceased, and defendant Melvin E. Shreder, the adopted son of said daughter, filed an answer and cross-complaint seeking to set aside said instruments upon the ground of alleged unsoundness of mind and undue influence. It is stated in the briefs that no evidence was introduced on the complaint for declaratory relief as the matter involved therein had become a moot question prior to the trial. The cause proceeded to trial before the court sitting without a jury upon the cross-complaint and the answer thereto. The trial court granted the cross-defendant's motion for nonsuit on the issue of undue influence, but found in favor of the cross-complainants upon the issue of unsoundness of mind. It filed its findings of fact and conclusions of law to the effect that the instruments dated October 2, 1931, and November 23, 1931, were null and void because of the unsoundness of mind of said Margaret M. Higgins and that cross-complainants were entitled to an accounting. An interlocutory decree was entered declaring cross-defendant to be an involuntary trustee and directing cross-defendant to render an accounting of all the trust property and the proceeds thereof, which were to be thereafter transferred to cross-complainant Edith May Dixon. Thereafter a final decree was entered decreeing that said instruments were null and void and canceling the same. Said decree also contained further provision for the transfer of the trust property. Cross-defendant appeals from the interlocutory decree and from the final decree.

[1] We are of the opinion that no appeal could be taken from said interlocutory decree. Code Civ.Proc. § 963; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; McFarland v. Mott, 123 Cal.App. 79, 11 P. 2d 18. Said interlocutory decree is reviewable, however, upon the appeal from said final decree. Code Civ.Proc. § 956.

The main contention of appellant herein is that there was no substantial evidence to support the trial court's findings to the effect that Margaret M. Higgins was of unsound mind at the time of the execution of said instruments. A review of the voluminous record and briefs leads us to the conclusion that this contention must be sustained, and it therefore appears unnecessary to discuss the other contentions of appellant.

Before summarizing the evidence, the provisions of the declaration of trust and the amendment thereto may be briefly outlined. By the declaration of trust dated October 2, 1931, the deceased transferred to appellant, as trustee, five parcels of real property, a group of stocks and bonds, and a promissory note in the principal sum of $13,875, together with the mortgage securing the same. The trustee was given the usual powers conferred upon trustees with respect to the management, investment, and reinvestment of the trust property, but reserving the right to the trustor to give written directions during her lifetime as to the exercise of these powers. It was further provided that the net income should be paid to the trustor during her lifetime, and that upon her death, said income should be paid 75 per cent. to respondent Edith May Dixon and 25 per cent. to respondent Melvin E. Shreder. The trust was not to continue beyond the life of the survivor of the two respondents and, upon its termination, the trust estate was to vest in Florence G. Hays, the niece of the trustor, or the issue of said Florence G. Hays. The trust was made revocable and the power to amend was reserved. There was also a so-called spendthrift provision prohibiting the assignment by the beneficiaries of any interest in the trust. By the amendment dated November 23, 1931, the sole change made was to provide that the trustee should pay out of the trust estate the expenses of the last illness and of the funeral of the trustor.

It therefore appears that said declaration of trust provided for an entirely natural disposition of the trust estate and the proceeds thereof in favor of the natural objects of the bounty of the trustor. It may be stated that the deceased had directed the preparation of five wills during the years from 1927 to the time of the execution of the declaration of trust in 1931, three of which had been executed by her, and in each of said five wills said respondents and said niece were the persons named as beneficiaries. Each of said wills was slightly different from the others, but all provided for the creation of trusts. Some contained emergency clauses empowering the trustee to supplement the payment of the income to respondents by payments from the corpus under certain circumstances. Respondents strongly stress the omission of an emergency clause from the declaration of trust in question, and said omission appears to be the main ground of complaint of respondents.

It may be further stated that the execution of the declaration of trust and the execution of the amendment thereto cannot be termed death-bed acts on the part of the deceased. These instruments were executed at the office of the trustee at a time when the deceased was actively caring for herself and her property and was apparently enjoying life as much as does the average person of her age. The deceased died on February 16, 1933, being about 16 months after the execution of the instruments in question.

When the declaration of trust was executed on October 2, 1931, Mrs. Higgins was 77 years of age and was residing at her home in Richmond. She had formerly lived for many years with her husband on a walnut grove in Covina. Mr. Higgins had died in 1926 and Mrs. Higgins managed the walnut grove until she moved to Richmond in 1927. She opened a bank account with appellant in 1927 and had numerous business dealings with the bank from that time until her death. Until the time of executing the declaration of trust, she had carried on all of her own business affairs, including dealing in real property, building a home, managing her own household, and handling all those transactions which are normally incident to the life of a person in her position. In 1930 Dr. Denman treated her for an abscess of her hip. Again in 1931, he treated her for bronchitis and a threat of pleurisy. Dr. Lacey also treated her in August, 1931, when she was suffering from hypertension. She also suffered from a high fever during that month. She nevertheless recovered from these illnesses.

In September, 1931, Mrs. Higgins first discussed with an officer of appellant her desire to execute a living trust as distinguished from a trust created by will. Several conversations were had on this subject at various times before the declaration of trust was executed. She indicated that she desired to eliminate the cost of probating a will and also indicated that she wanted to keep the principal of her holdings intact in order that her daughter might have some income, although small, for the entire life of the daughter. Mrs. Higgins' property had declined in value and, as she felt that her daughter was improvident and would not act wisely if allowed to draw upon the corpus of the trust, she requested appellant to omit any provision which would permit this. The declaration of trust was drawn and executed as a result of these discussions. After the execution of the trust, it occurred to Mrs. Higgins that she had not provided for the payment of the expenses of her last illness and her funeral expenses out of the trust property. On her own initiative, she again consulted an officer of appellant and arranged for and executed the amendment of November 23, 1931.

Thereafter Mrs. Higgins consulted various officers of appellant at the bank on several occasions, and gave instructions as to the management of the trust properties as she had the right to do under the declaration of trust. She also withdrew properties from and added properties to the trust estate. She also carried on litigation, as plaintiff, for the foreclosure of the mortgage on the Covina walnut grove. In fact, the record discloses that she was quite active for a woman of her age and that she engaged in both social and business activities. She visited friends at various times, including times both shortly before and shortly after the execution of the declaration of trust and the amendment, and she had guests at her own home for dinner on various occasions including Christmas Day, December 25, 1931.

There were introduced in evidence numerous letters and other documents written and executed by Mrs. Higgins. Nine of these bore various dates in 1931 and seventeen bore various dates in 1932. An examination of the substance, form, and penmanship of these letters and documents can lead only to the conclusion that Mrs. Higgins was entirely normal at the times said letters were written, and that she was apparently quite a remarkable woman for her age. With the facts before him including these letters and documents, Dr. Rowell expressed the opinion as follows: "I think that there is enough to show that at any and all times she knew what she was doing, and was a rather clever, shrewd business woman."

On December 29, 1932, Mrs. Higgins was attended by Dr. Fraser, who attended her through her last illness and until her death on February 16, 1933. In the light of the testimony given by Dr. Fraser on the trial, it is interesting to note that his records showed a memorandum made by him on December 29, 1932, with respect to Mrs. Higgins' condition. In this memorandum he noted her as "mentally active." It may be further stated that Dr. Fraser testified that he was present when Mrs. Higgins executed a will on February 4, 1933, being 12 days before her death, and that in his opinion she was competent to execute a will at that time. After the death of Mrs. Higgins, respondents recognized the trust and accepted benefits therefrom until after the filing of this action for declaratory relief and at all times prior to the filing of their cross-complaint on December 16, 1933.

[2] We now turn to the testimony introduced by respondents in support of their claim that Mrs. Higgins was of unsound mind on October 2, 1931, and on November 23, 1931, bearing in mind that there is a presumption that Mrs. Higgins was at all times of sound mind and that the burden was upon respondents to show affirmatively by a preponderance of the evidence that Mrs. Higgins was of unsound mind at the times in question. Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Casarotti, 184 Cal. 73, 192 P. 1085.

[3] Said testimony consisted mainly of the opinions of two medical men, Dr. Fraser and Dr. Merrithew, based upon hypothetical questions, and the opinions of certain acquaintances of Mrs. Higgins, based upon observation, as to the competency of Mrs. Higgins. The field covered by the direct and cross-examination of these witnesses was very broad and it would be difficult to relate all of the testimony which was admitted as constituting alleged reasons for the opinions of these witnesses. It is well settled, of course, that while both expert and nonexpert witnesses may express opinions on the issue of competency, it is not the abstract opinions which are of importance but the reasons given in support of such opinions. Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Smethurst, 15 Cal.App.2d 322, 59 P.2d 830.

In support of their opinions and as reasons therefor, respondents' witnesses gave testimony concerning the physical impairment of Mrs. Higgins, including arteriosclerosis and high blood pressure and other ailments common to old age; also testimony concerning claimed mental impairment evidenced by lack of memory at times, inability to concentrate at times, the doing of eccentric things at times, and the laboring under alleged delusions at times. There was also evidence of nervousness, irritability, stubbornness, and similar characteristics and traits. Some of this testimony referred to the time shortly after the death of Mr. Higgins when Mrs. Higgins was suffering from the shock of the loss of her husband and other testimony referred to the time in August, 1931, when Mrs. Higgins was ill and was suffering from a high fever. In any event, none of this testimony was based upon the actions of Mrs. Higgins at or about the time of executing the instruments in question and it does not appear that any of the respondents' witnesses had seen Mrs. Higgins either upon October 2, 1931, or upon November 23, 1931.

We will now consider the testimony of certain witnesses, upon whose testimony respondents place their greatest reliance, in order to show how unsubstantial their testimony was when viewed in the light of the authorities dealing with the subject of what constitutes substantial testimony on the issue of incompetency.

[4] Dr. Fraser testified that he first saw Mrs. Higgins on December 29, 1932. Attempts were made to obtain answers to hypothetical questions on his direct examination, but the questions and answers on direct examination fail to show any clear statement as to just what the witness' opinion was concerning the competency of Mrs. Higgins on October 2, 1931, and November 23, 1931. Furthermore, none of these questions disclosed to the witness the letters and other documents of Mrs. Higgins, the importance of which omission is emphasized in Estate of Clark, 100 Cal. App. 357, 280 P. 204. The thought of the witness on the subject of competency is probably well summed up in his statement that "I do not think anyone with a delusion is competent." This may be true from a medical standpoint, but it is certainly not true from a legal standpoint. Estate of Finkler, supra. The witness' answers given on cross-examination appear for the most part to be far more favorable to appellant's claims than to those of respondents. We will quote some of his testimony on cross-examination which is fairly indicative of the tenor of his entire testimony.

The witness testified, "It is quite characteristic, your Honor, of this particular type of mental disturbance to have perfectly lucid intervals all through the duration of this psychosis up until the time when they have acute symptoms, such as preuremic stage, in the last stage, say, of a kidney failure or, of course, in a comatose stage of a cerebral hemorrhage, but all through the illness they are perfectly lucid at intervals." When asked whether the reading of Mrs. Higgins' letters would influence him in his opinion as to her condition at the time she signed the instruments in question, he said, "Not unless I knew the medical or the physical condition on that day that the document was executed. In other words, as I mentioned this morning, she may have instances or intervals of perfectly lucid mentality. Now whether or not she would have enough—whether she has such intervals of such a mentality on the date that this instrument was executed, I don't know."

With respect to the letters of Mrs. Higgins and along the line of the foregoing testimony, the following questions and answers of Dr. Fraser are found in the record:

"Q. Weren't you able to ascertain from the reading of the letters, the fact that on the date of the letters—the respective letters, Mrs. Higgins had the mentality to carry in mind the nature and value of her property? A. I believe so on those dates, yes.

"Q. Were you able to ascertain that she would be able to carry in mind the relationship of her relatives to her and those that were dear and near to her? A. On the dates of the letters, yes.

"Q. Yes? A. I believe so.

"Q. Were you able to ascertain that she might be able to dispose of property mentioned in those letters on the 2nd day of October, 1931? A. I couldn't tell whether she was on the particular day mentioned but I would say that on those dates that the letters were written that she was.

"Q. Well, having conceded that, suppose on the 2nd day of October, 1931, and on the 23rd day of November, 1931, the two dates on which the documents were executed, Mrs. Higgins had what you term lucid intervals, would she during any one of those intervals be able to execute such a document? A. I think so if her medical condition was such that—or appeared to be as good as those letters—as she was on the dates that these letters were written.

"Q. Yes, well, wouldn't you say that on the respective days that she wrote those letters and at the very instance or hour or half hour that she expended in writing those letters, that she was all right mentally? A. I think so, yes.

"Q. Yes? A. But she might be suffering from high blood pressure or an arterialsclerotic condition.

"Q. Yes, but wouldn't the contents of those letters, Doctor, indicate to you, as a medical expert—you are here as an expert, Doctor, on the very instant that she wrote those letters—started to write them, during all the time that she was writing them, that her blood pressure and her sclerotic condition did not affect her mental condition? A. Yes, I agree with that."

The only other expert witness called by respondents was Dr. Merrithew and his testimony was of no greater assistance to respondents than that of Dr. Fraser. When asked if he had been sufficiently informed to pass on the competency of Mrs. Higgins, he stated, "Of course, it is a pretty hard thing, as you can realize. I never met this lady." He did give his opinion that Mrs. Higgins was not competent, but this opinion was followed by the following questions and answers:

"The Court: Even though she could understand the nature and location of her property and the nature of the act she was doing? A. I think she did and I have testified to that all the way through.

"Q. Yes, but, Doctor, you have testified that in your opinion she did know the nature of her act when she had that amendment prepared. Wouldn't that influence you to the effect that she knew the nature of the original act, that is, the main instrument? A. I think she did.

"Q. The trust agreement itself? A. I think she did. I think she knew—I think she had that thing drawn up just the way she wanted it.

"Q. Yes. A. Still I don't think she was competent from the history you relate to me.

"Q. Still you feel that she had both instruments drawn up the way she wanted them? A. I do.

"Q. You notice that there was provision made for them? A. If I remember right, one was to have three-fourths and the other one-fourth of her income.

"Q. Do you think she did understand her relations to the persons who had claim to her bounty? A. I think she did.

"Q. Yes. Going back to Number 2. You noticed, did you not, Doctor, that there was mention of her property in the trust agreement? A. It was stock and property.

"Q. Of October 2, 1931. A. Stocks and properties and amounts, yes, sir.

"Q. Yes. Then did you say in response to Number 2 that she understood and recollected the nature of her property? A. I think possibly she did. I think she knew everything she had.

"Q. Yes. Then would you say in response to Number 1 that she had the ability to understand the nature of the act she was doing? A. I think she understood, as I said before.

"Q. Yes, and your answers would be the same for the document that she signed on November 23, 1931? A. Yes, sir."

It should be remembered that it was over a year after the execution of the instruments that Dr. Fraser first saw Mrs. Higgins. Dr. Merrithew never saw her at all. The hypothetical questions assembled the testimony upon which respondents relied to show deviations from the normal at times and in answer to the hypothetical questions or other questions, the doctors expressed in some form the opinion that Mrs. Higgins was not competent. However, the testimony assembled in the hypothetical questions was only remotely connected in point of time with the execution of the instruments and there was no testimony stated in the hypothetical questions relating to claimed deviations from normal which occurred closer to the times in question than August, 1931.

[5, 6] The testimony of the nonexpert witnesses produced by respondents was likewise unsubstantial. It would serve no useful purpose to relate the testimony of each of said witnesses. Their opinions were all based upon the matters hereinabove referred to. None of the witnesses appeared to believe that Mrs. Higgins was incompetent at all times but, as some expressed it, they believed she had good times and bad times or good cycles and bad cycles. None of the witnesses saw her on the days in question and none could testify as to whether she was having a so-called bad time or bad cycle when the instruments were executed. The reasons given by most of the witnesses were wholly insufficient to show that Mrs. Higgins was incompetent at any time and it is probable that the main reason for their opinions is found in the conclusion drawn and expressed by respondent Edith May Dixon as a reason for her opinion. She concluded that owing to her own needs and the diminished value and income of the trust estate, her mother "would never have signed the October 2, 1931, declaration of trust if she had been in her right mind and understood it." This reason is strongly stressed by respondents in their brief and is dignified by the caption "Res Ipsa Loquitur." But we are of the opinion that this conclusion and the other alleged reasons stated by the witnesses were wholly insufficient to sustain their opinions as to the general mental incompetency of Mrs. Higgins, and that the record is devoid of any substantial evidence to sustain the findings of general mental incompetency. There are numerous authorities on the subject of what constitutes substantial evidence of general mental incompetency and in many of the cases a stronger showing than that made in the present case was held

to be insufficient. Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Presho, 196 Cal. 639, 238 P. 944; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of MacCrellish, 167 Cal. 711, 141 P. 257, L.R.A. 1915A, 443; Estate of Grant, 8 Cal.App.2d 232, 47 P.2d 508; Estate of Short, 7 Cal. App.2d 512, 47 P.2d 555; Estate of McDonnell, 109 Cal.App. 577, 293 P. 651; Estate of Whitworth, 110 Cal.App. 526, 294 P. 84; Estate of Clark, 100 Cal.App. 357, 280 P. 204; Rollins v. Smith, 72 Cal.App. 773, 238 P. 171; Estate of Little, 46 Cal. App. 776, 189 P. 818.

Respondents apparently contend that regardless of the question of the sufficiency of the evidence to show general mental incompetency, there was sufficient evidence to show that Mrs. Higgins suffered from delusions "which created unjust antagonism and distrust toward her daughter." This contention would seem to be at variance with the portion of respondents' brief which dwells at length on the love and affection which existed between the mother and daughter throughout their lives and down to the very time of the death of Mrs. Higgins. It is apparent that it is not contended that Mrs. Higgins entertained any fixed delusions producing such antagonism and distrust, but evidence was introduced which showed that at certain times, particularly after the death of Mr. Higgins in 1926 and again in August, 1931, Mrs. Higgins did certain things from which it might be inferred that she did suffer from certain delusions at said times. But there is not a particle of evidence from which it could be inferred that Mrs. Higgins was suffering from any delusion of any kind on October 2, 1931, or November 23, 1931. On the contrary, it affirmatively appears that Mrs. Higgins was not suffering from any delusion at either of said times, and that she was motivated by feelings of affection for respondents in providing in the declaration of trust that they should receive the entire income of the trust estate. It appears, however, that Mrs. Higgins believed that respondents were improvident and that the provisions of the declaration of trust constituted the best means of making certain that respondents would have some income from the trust estate throughout their lives and that respondents could not dissipate the trust estate. Such a belief was not a delusion and we need only turn to the testimony of Dr. Merrithew on this subject. He was asked, "Well, Doctor, assume that she felt that her daughter was improvident in the use of money, didn't know how to take care of money and that she knew how much she had and wanted that money fixed so that her daughter would have a life income and that she had stated that she didn't want her daughter to squander it, would that influence you?" He answered, "Well, if those are the facts, it wouldn't be a delusion." It appears that this belief was a rational belief on the part of Mrs. Higgins, but it would be immaterial if it was a mistaken belief. Estate of Powell, 113 Cal.App. 670, 299 P. 108; Estate of Peterson, 13 Cal.App.2d 709, 57 P.2d 584. We conclude that the evidence was insufficient to show that Mrs. Higgins was suffering from any delusion at the times in question or that any delusion "bore directly upon and influenced the creation and terms of" the trust. Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Clark, 100 Cal.App. 357, 362, 280 P. 204.

Respondents contend that there were other findings sufficient to sustain the interlocutory and final decrees, but a review of the findings shows that said decrees cannot stand unless the findings relating to the incompetency of the testator may be sustained. As above indicated, we are of the opinion that there was no substantial evidence to support said findings.

This cause has been fully tried as is evidenced by the voluminous transcript. The evidence produced by both sides indicates that no useful purpose would be served by a second trial and it therefore appears appropriate to order a reversal with directions.

The interlocutory decree and final decree are reversed with directions to the trial court to enter a decree denying the relief prayed for in the cross-complaint.

We concur: NOURSE, P. J.; STURTEVANT, J.

25 Cal.App.2d 738

In re NOLAN'S ESTATE.

NOLAN et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 10757.

District Court of Appeal, First District, Division 2, California.

April 18, 1938.

As Modified on Denial of Rehearing May 18, 1938.

Hearing Denied by Supreme Court June 16, 1938.

1. Wills 🔑1

Testator may dispose of his property as he wills, and is not called on to consult or satisfy wishes or views of juries or courts. Probate Code, § 20.

2. Wills 🔑324(2)

The only fact question for jury to determine in will contest on ground of testator's mental unsoundness is whether testator was of sound mind when will was executed. Probate Code, § 20.

3. Wills 🔑50

A testator is of "sound and disposing mind and memory," if he has sufficient mental capacity at time of making will to understand nature of his act, understand and recollect nature and situation of his property, and remember and understand his relations to persons having claims on his bounty, whose interests are affected by provisions of will. Probate Code, § 20.

[Ed. Note.—For other definitions of "Sound and Disposing Mind," see Words & Phrases.]

4. Trial 🔑194(9)

An instruction, in will contest on ground of testator's mental unsoundness, that will, leaving testator's property to persons who would receive nothing if he died intestate to exclusion of natural objects of his bounty, is to be considered unnatural, in absence of evidence explaining such disposition of his estate, was erroneous as incorrect and invading jury's province, in view of previous instruction that unjust or unnatural will is evidence of testator's mental incapacity. Probate Code, § 20.

5. Wills 🔑52(2)

Dispository clauses of will, leaving testator's property to persons who would receive nothing if he died intestate to exclusion of natural objects of his bounty, are not in themselves evidence of testator's mental incapacity overcoming presumption of sanity and competence. Probate Code, § 20.

6. Wills 🔑52(1)

The law presumes that testator was of sound mind when will was executed. Probate Code, § 20.

7. Wills 🔑52(1)

The burden is on parties contesting will on ground of testator's mental unsoundness to overcome presumption that he was of sound mind when will was executed by satisfactory proof. Probate Code, § 20.

8. Wills 🔑163(6)

The burden resting on proponents of will, contested on ground of undue influence in named beneficiary's behalf, to explain testator's omission or failure to provide for natural objects of his bounty, does not rest on proponents to support legal presumption of testator's sound mind at time of making will. Probate Code, § 20.

9. Wills 🔑82

The "natural objects of testator's bounty" are his descendants, surviving spouse and parents, and his nephews, nieces, brothers, sisters, and other collateral heirs are not natural or normal objects of his bounty because of such relationship alone.

[Ed. Note.—For other definitions of "Natural Object of Testator's Bounty," see Words & Phrases.]

10. Evidence 🔑568(2), 571(2)

The opinion of witnesses, relied on by will contestants, that testator was of unsound mind at time of making will, is of no greater value than reasons given in support of such opinion. Probate Code, § 20.

11. Wills 🔑55(1)

Evidence in will contest *held* insufficient to support jury's verdict that testator was mentally unsound at time of executing will. Probate Code, § 20.

Appeal from Superior Court, Marin County; Edw. J. Butler, Judge.

Proceeding by Denis Nolan and others to revoke the probate of the will of Michael D. Nolan, deceased, opposed by the Bank of America National Trust & Savings Association, executor, and James J. Nolan, legatee and devisee. From a judgment on a verdict for contestants, contestee James J. Nolan appeals.

Judgment reversed, with directions.

Duke & Cowen, of San Rafael (C. F. Reindollar, of San Rafael, of counsel), for appellant.

John B. Ehlen and I. F. Chapman, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

In this proceeding to revoke the probate of a will the contestants had a verdict. Two petitions on behalf of separate contestants were consolidated for trial. The petitions pleaded three grounds of contest—mental unsoundness, improper execution of the will, and undue influence. At the conclusion of the contestants' case the contestees moved for a nonsuit, whereupon the contestants voluntarily dismissed as to their second and third grounds of contest. The motion for a nonsuit as to the remaining ground was denied. At the conclusion of the trial, the court denied contestees' motion for a directed verdict. The jury then returned a verdict that the testator was mentally unsound at the time of the execution of the will, whereupon the contestees moved for judgment notwithstanding the verdict. This motion was denied and judgment on the verdict was entered. The contestees have appealed from this judgment.

[1-3] We will limit our opinion to the question of the sufficiency of the evidence to sustain the verdict, and will review the evidence in the light of these settled legal principles: Every person of sound mind, over the age of eighteen years may dispose of his separate property by will (Probate Code, § 20); the property of the testator is his to dispose of as he wills, and he is not called upon to consult or satisfy the wishes or views of juries or courts. (Estate of Spencer, 96 Cal. 448, 452, 31 P. 453; Estate of Perkins, 195 Cal. 699, 709, 235 P. 45); and "Whether in the minds of others a will is just or unjust is a matter of opinion, and to permit a jury to determine the question without that substantial evidence which the law requires would be to permit a jury to make the disposition irrespective of the desires of a testator." Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816, 819. The single question of fact for the jury to determine in contests of this kind is whether, when the will was executed, the testator was of "sound mind" and thus within the terms of section 20 of the Probate Code. Numerous decisions have laid down the rule to be followed for that purpose. A clear and succinct statement of the rule is found in Estate of Smith, 200 Cal. 152, 158, 252 P. 325, 328, as follows: "A testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."

We will first dispose of the question of the claimed unnaturalness of the will. The deceased was a bachelor, and left no parent, brother, or sister. He lived alone in the city of Sausalito where he owned and operated a grocery store for many years. His next of kin were the nephews and nieces who are the contestants. The beneficiary was a cousin. Some of the contestants lived in Ireland, some in New York, and some in Canada. The testator had corresponded with some of those residing in Ireland until about two years prior to the execution of the will, but it does not appear that he had any knowledge of those living in New York or of those living in Canada. The beneficiary lived in Oakland, Cal., and had visited the testator frequently, showed him many kindnesses, and had apparently won his admiration and regard. The testator had frequently urged the beneficiary to move to Sausalito and join him in the operation of the store. On numerous occasions the testator had been importuned to send money to some of his kin residing in Ireland, and some small sums had been sent, prior to the year 1932, to the mother of some of these contestants, a sister of the testator who predeceased him. About that time correspondence with these relations seems to have been discontinued. The will was executed in August, 1934; the testator died on April 14, 1936. No correspondence between any of these parties was produced in evidence covering the period after the year 1932. There is no evidence that the testator contributed any funds to aid any of the contestants after that year. There is some testimony that letters were received from the testator at a later period, but it is significant that none written after 1932 were preserved, or offered in evidence.

[4-8] Upon these facts the trial court instructed the jury that the beneficiary was

not an heir at law of the testator, and that, "In the absence of evidence explaining the testamentary disposition of a decedent's estate, *his will is to be considered unnatural* if, to the exclusion of natural objects of his bounty, it leaves his property to persons who would receive nothing in case he had died intestate." The error of this instruction is apparent. It arises from the loose language used in many of the decisions on the effect of "unnatural" provisions of a will. This is an element supporting an *inference* of undue influence when the testament is attacked on that ground, and is of like value when it is claimed that the testator was laboring under hallucinations which had caused him to make an unreasonable or unjust discrimination against some of his heirs at law. But, when mental incapacity is the ground of attack, the dispository clauses of the will are not, in and of themselves, *evidence* of mental incapacity which would overcome the presumption of sanity and competence. Section 20 of the Probate Code provides that every person "of sound mind" may dispose of his property by will as he sees fit—not in equal proportions to those who would inherit under the laws of succession in case of intestacy. The law presumes that the testator was of sound mind when the will was executed. Hence, the burden is upon the contestants to overcome this presumption with satisfactory proof. Estate of Smith, 200 Cal. 152, 160, 252 P. 325. The "explanation," so often referred to in the decisions, of the omission or failure to provide for the "natural objects" of his bounty may be required of the proponents when the undue influence in behalf of the named beneficiary has been shown, but no such burden rests upon them to support by further proof the legal presumption of sound mind. For these reasons it was error to instruct the jury that the "will is to be considered unnatural" in the absence of such explanatory evidence. Having theretofore instructed the jury that an unjust or unnatural will was "evidence" of the mental incapacity of the testator, the court invaded the province of the jury when it declared that this will was to be considered an unnatural one.

[9] As we shall hereafter point out, there was no substantial evidence of the mental incapacity of the testator and the jury's verdict can be explained only as an expression of its dissatisfaction with the disposition of the estate made in the will, and of its sympathy for those who were not provided for. The issue was given unusual stress by the contestants and a large part of the testimony was directed to the effort of showing that the will was unjust and unnatural. But the question was never properly an issue in this proceeding. The expression "natural objects" of the testator's bounty has reference to the descendants, surviving spouse, and parents of the testator, who, purely by reason of relationship, may be assumed to have had claims upon his bounty. 26 Cal.Jur. p. 695. Nephews, nieces, brothers, sisters, and other collateral heirs, are not, because of such relationship alone, natural or normal objects of bounty. Estate of Easton, 140 Cal.App. 367, 377, 35 P.2d 614; Estate of Jacobs, Cal.App., 76 P.2d 128. In Estate of Finkler, 3 Cal.2d 584, 597, 46 P.2d 149, it was held that nephews and nieces of a predeceased spouse, though heirs at law, were not the natural objects of the bounty of the testator. The undisputed evidence here is that many of the contestants were unknown to the testator; that he had not seen any of them and knew them only as children of his deceased brothers and sisters; that he had never contributed to their support after the death of their parents; and that he had refused the importunities of one of the witnesses to give financial aid to some of the contestants sometime during the year 1932. He was a lone man who had gone through a long struggle to build up a moderate business. He lived alone and worked alone, and did not deem himself obligated to anyone.

[10, 11] The additional evidence offered by the contestants to prove his mental incapacity may be briefly summarized: Several of the witnesses testified that he failed to remember them when they came to his store, and that he had difficulty in making change on purchases. But these witnesses generally agreed that such lapses were merely temporary, that at other times he appeared rational, and that they continued to deal with him as they would with a man in possession of all his mental faculties. A salesman for a wholesale house found the deceased forgetful when he tried to collect a bill, but active and alert when he tried to sell the deceased more goods. Customers emphasized his difficulty in making change, and all said that he gave them too much, but his business continued to prosper for a year and a half after the will was executed, when he was compelled to retire because of ill health. In May, 1932, he suffered head injuries in a burglary at his store, and for some time thereafter had fainting spells. Much of the testimony of these witnesses related to that period. His physician testified that he had many mental lapses, but that he was sane and rational at other times. His regular attorney, who did not prepare the will, testified that he did not believe that the testator knew that he had signed the will, but, within three days after its execution and on several occasions thereafter, he discussed the subject with the deceased who told him he had made a will and named the beneficiary. The same witness, in his capacity of attorney for the deceased, prepared legal documents which he had the deceased execute and represented him in court proceedings both before and after the date of the execution of the will. On all these occasions he would have sworn that the deceased was mentally competent. Immediately after the execution of the will he discussed with the deceased the advisability of altering some of the provisions of the will, or the making of a new will. He was prepared to perform that service and would have judged the deceased competent on those occasions to perform the testamentary act. A physician, who first treated the deceased for the head injuries in 1932, testified that he called on the deceased on several occasions during the years 1932 to 1935, that he believed the deceased was incompetent at the time he executed the will. He gave no reason for his opinion except that the deceased suffered lapses of memory, fainting spells, and periods of extreme illness. He testified that he was competent on many of the occasions when he saw him. He gave the opinion that during the periods of mental incompetency it would have been impossible for the deceased to add a column of figures, write, sign his name, give information concerning his relatives and where they lived, or keep accounts with customers of goods charged to them—all of which acts the deceased performed at the time the will was made.

Merely for the purpose of completing the story of the trial we will add a short resume of proponents' evidence. The two subscribing witnesses, who were employees of the local bank where the deceased had done his banking business over a period of seven years, testified that he was mentally competent when the will was executed. He gave to one of them all the information relating to his property and kin. He assigned as his reason for preferring the named beneficiary (James Nolan) that the latter had been kind to him, and that he hoped to have him join him in the conduct of his business. He gave the name and address of the nephew living in Ireland who was designated as a beneficiary in the event that James Nolan should predecease him. He stated to these witnesses that he had other nephews and nieces living in Ireland, but that he did not want them to have any of his property. It was also shown that he conducted the store without help; did all his buying for the store; kept books of account; owned and rented real property; loaned money on mortgages; executed in his own hand promissory notes and receipts for money paid; and conducted his banking business without outside aid. He employed a regular attorney, who prepared mortgages and similar documents for him to sign and represented him in legal proceedings.

The testimony of the witnesses upon which the contestants rely must be measured by the rule that their opinion that the testator was of unsound mind "is of no greater value than the reasons given in support of the opinion." Estate of Flint, 179 Cal. 552, 553, 177 P. 451; Estate of Redfield, 116 Cal. 637, 655, 48 P. 794; Estate of Finkler, 3 Cal.2d 584, 594, 46 P.2d 149, 153. In the latter case the court approved this statement taken from Stackhouse v. Horton, 15 N.J.Eq. 202: "No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property, is a question which the court must determine upon its own responsibility." While some of the testimony offered by the contestants tends to show that decedent displayed lapses of memory, and certain peculiarities over a period of four or five years, the same testimony showed that, during all the period covered, he was conducting his business in an efficient, methodical, and businesslike manner, and usually without the help or advice of anyone, other than his attorney. The case may be summed up in the language of Estate of Wright, 7 Cal.2d 348, 356, 60 P.2d 434, 438, reading: "Tested by the decisions of this court, the judgment is wholly without evidentiary support. There is no evidence that testator suffered from settled insanity, hallucinations, or delusions. Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act. * * * The burden was upon contestant throughout the case. Taking all the evidence adduced by contestant as true it falls far below the requirements of the law as constituting satisfactory rebuttal of the inference of testamentary capacity. No proof whatever was offered tending to rebut the testator's ability to transact or conduct his business or to care for himself except in a few cases of illness brought about by natural causes or excesses or by accident." Recent cases to the same effect are: Estate of Finkler, 3 Cal.2d 584, 596, 46 P.2d 149; Estate of Smith, 200 Cal. 152, 158, 252 P. 325; Estate of Peterkin, Cal.App., 73 P.2d 897, and Estate of Flatau, Cal.Sup., 76 P.2d 506.

All the parties here had their day in court, and the litigation should be ended without unnecessary delay and expense. The motion of the proponents for a judgment notwithstanding the verdict should have been granted.

It appearing from the whole evidence that a verdict should have been directed in favor of proponents, and that a motion therefor was made before entry of judgment, the judgment is reversed with directions to enter judgment in their favor as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

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26 Cal.App.2d 33

MOON et al. v. MARKER et al.

Civ. 5985.

District Court of Appeal, Third District, California.

April 18, 1938.

Hearing Denied by Supreme Court June 16, 1938.

1. Mines and minerals 🔑73½

Under oil and gas lease for ten years and so long thereafter as oil or gas be produced in paying quantities, lease terminated and lessees became mere tenants at sufferance after expiration of ten years, when no gas or oil was produced in paying quantities, and hence lessees were not entitled to notice to surrender possession as prerequisite to maintenance of ejectment suit by lessors.

2. Mines and minerals 🔑73½

An oil and gas lease for ten years and so long thereafter as oil or gas should be produced in paying quantities vested no rights in lessees except inchoate title for purpose of exploration and development of oil and gas according to terms of lease, and lessees could claim no right of possession after ten years except by establishing as a fact that oil or gas had been produced in paying quantities.

3. Mines and minerals 🔑77

Where first notice to surrender possession, addressed to lessees of large acreage under oil and gas lease, was signed by owners representing more than four-fifths of the acreage, and by all owners of section in which lessees were interested, and second notice was signed by five directors of owners' association, notice given was sufficient as basis for ejectment suit to recover possession.

4. Mines and minerals 🔑77

In ejectment suit by lessors under oil and gas lease against lessees, allegations of lessees' joint answer that defendants were "and now are" in possession, and testimony of manager of lessees' enterprise, examined as adverse party, was sufficient proof that lessees were in actual possession. Code Civ. Proc. § 2055.

5. Appeal and error 🔑1036(2)

In ejectment suit by lessors against lessees under oil and gas lease, that a nonexistent corporation was made a party defendant under assumption that lessees were operating oil enterprise in name of such company was immaterial, where individual lessees appeared and answered and no judgment was entered against corporation.

4. Mines and minerals 🔑77

In ejectment suit by joint lessors against lessees under oil and gas lease, there was no variance between complaint alleging that plaintiffs were the owners and entitled to immediate possession of entire tract but subsequently describing particular tract owned by each individual lessor, and proof that individuals owned separate tracts as listed in the complaint.

7. Pleading 🔑406(7)

In ejectment suit by joint lessors against lessees under oil and gas lease, alleged uncertainty in complaint regarding ownership of specific tracts by particular lessors was waived by failure to demur to the complaint.

8. Mines and minerals ⚷73½

In ejectment suit by joint lessors against lessees under oil and gas lease, brought on ground that lease had automatically terminated by lapse of time and failure to produce oil and gas in paying quantities, by owners of all tracts in which defendant lessees were interested, other lessors owning other tracts need not be made parties plaintiff.

9. Mines and minerals ⚷77

An optional right given by lease to joint lessors to declare a forfeiture for breach of oil and gas lease, as distinguished from right to recover possession after automatic termination of lease, must be exercised by all lessors, since failure of one lessor to become a party may show waiver of breach which may be deemed waiver by all lessors.

◆

Appeal from Superior Court, Tehama County; Albert F. Ross, Judge.

Suit in ejectment by W. A. Moon and others against M. M. Marker and others, to recover possession of land on ground that oil and gas lease thereof had terminated by its terms. From a judgment for plaintiffs, five of the defendants appeal.

Affirmed.

Will H. Winston, of Long Beach, for appellants.

Pugh & Pugh, of Red Bluff, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

From a judgment which was rendered in a suit in ejectment, five defendants have appealed. They claim the right under a sublease to retain possession of section 31, township 25 north, range 5 west, M. D. M., being a portion of a tract consisting of 45,126 acres of land in Tehama county, jointly leased for a specified term of ten years to M. Kinnebrew by numerous property owners for the purpose of prospecting for oil and gas. The lease was executed February 1, 1926. It contained the following provision: "This lease shall continue for a period of ten years from and after the date of this agreement, and so long thereafter as oil or gas be produced on the above premises in paying quantities."

Within two months after the expiration of the ten-year term of the lease notices were served on the appellants and all other lessees to relinquish possession of their respective portions of the property. The original lessee, M. Kinnebrew, executed innumerable subleases of various portions of the tract, five or six thousand of which were recorded. None of the lessees, except the appellants, attempted to sink wells on their portions of the property. All lessees relinquished possession of their respective tracts except the appellants. Promptly after expiration of the term of the original lease, notices were served on the appellants to quit the premises and this suit was then commenced. March 31, 1936. The five appellants jointly appeared as individuals and filed their answer alleging that they held possession of said section 31 of the property described under mesne assignments of interests in the oil lease mentioned, and asserted that the lease "is now in full force and effect," and "that oil and gas was being produced by these defendants from said real property * * * in paying quantities on the first day of February, 1936."

At the trial the chief issue was whether oil or gas had been produced in paying quantities. The only well which was ever attempted to be drilled on the entire tract was commenced by the appellants in September, 1928. Operations on that well were conducted very spasmodically, and ceased in June, 1935. The well reached a depth of 4,424 feet. A slight quantity of oil was produced. The evidence is quite satisfactory that neither oil nor gas was produced therefrom in paying quantities. Prior to the expiration of their lease, February 1, 1936, the appellants attempted to secure a renewal of their sublease, which was refused. The lease was never renewed or extended.

The court found that the plaintiffs, Walter H., Anna L., Edwin H., Francis B., Elizabeth J., James E., and Eldora Fay Heavey are the owners of section 31, township 25 north, range 5 west, M. D. M., in Tehama county, and are entitled to the possession thereof; that the appellants, who claim an interest in, and the right to, the possession of said section 31 by mesne assignments under the original oil lease to M. Kinnebrew, dated February 1, 1926, drilled thereon, prior to February 1, 1936, one oil well only, which was sunk to a depth of 4,424 feet, but which produced no oil or gas in paying quantities; that all operations thereon ceased in June, 1935; that their leases expired January 31, 1936, and that they therefore had no right to possession of any portion of the property subsequent to that date; that notices to relinquish possession of the property were served on the appellants February 19, 1936, and this suit was then promptly commenced. A decree was accordingly rendered against the appellants for possession of the property. From that judgment this appeal was perfected.

[1,2] It is contended a demand and notice to surrender possession of the property was a necessary prerequisite to the maintenance of this suit in ejectment and that the notices which were served on the appellants were defective for the reason that they were not signed by all of the plaintiffs who claim an interest in other portions of the aggregate tract of land jointly leased by them. We are of the opinion there is no merit in this assertion. The oil lease which is involved in this case vested in the appellants no rights except the inchoate title thereto for the purpose of exploration and development of oil and gas according to its terms. Hall v. Augur, 82 Cal.App. 594, 599, 256 P. 232. Under the express terms of the lease those rights terminated January 31, 1936, unless oil or gas was previously produced in paying quantities. The only well which the appellants endeavored to drill was abandoned in June, 1935, seven months before the expiration of the ten-year term of the lease. The court found that well did not produce oil or gas in paying quantities. That finding is adequately supported by the evidence. The appellants offered no evidence in support of their answer which alleges that they had produced oil and gas in paying quantities. We must, therefore, assume the lease terminated, as the court found that it did, January 31, 1936. The provision of the lease with respect to the production of oil or gas in paying quantities was a condition precedent to the extension of the lease beyond the ten-year term thereof. The establishing of that condition as a fact became the only possible theory on which the appellants could claim any right of possession. Parks v. Sinai Oil & Gas Co., 83 Okl. 295, 201 P. 517; Roach v. Junction Oil & Gas Co., 72 Okl. 213, 179 P. 934; 1 Thornton Oil & Gas p. 153, § 91. The evidence affirmatively shows that no gas or oil was produced in paying quantities. The appellants, therefore, became mere tenants of the land at sufferance after the termination of the lease on January 31, 1936. As such tenants at sufferance they were not entitled to notice to surrender possession of the land as a necessary prerequisite to the maintenance of this suit for possession thereof. Hauxhurst v. Lobree, 38 Cal. 563; Hull v. Laugharn, 3 Cal.App.2d 310, 39 P.2d 478; 15 Cal.Jur. 643, §§ 52, 53. But notices to surrender possession of the land were, nevertheless, served on the appellants.

[3] The appellants may not complain of lack of notice to surrender possession of the land to which they claimed their rights by virtue of mesne assignments under the Kinnebrew lease dated February 1, 1926. February 22, 1936, written notices to vacate the premises were served on the appellants and posted on the derrick at the site of the oil well, and at the fork of the roadway leading to the well. These notices were signed by each of the above-named owners of section 31, and by nearly all of the owners of other portions of the entire tract leased. These signatures were acknowledged by a notary public. The appellants were not interested in any other portion of the properties leased except section 31 thereof. Other written notices to surrender possession of the land, signed by W. A. Moon, J. E. Heavey, Robert Boot, W. H. Heavey, and D. O. DeHaven, original lessors of portions of the 45,126-acre tract of land, as "Directors of Community Lease Association and Agents of the lessors and their successors," were subsequently served on the appellants and also posted on the derrick and at the fork of the roadway leading thereto. In paragraphs A, B, C, D, and E of the original lease it is provided that the entire acreage shall be leased in one tract or pool and that the "control, management and security" of the individual interests and affairs of the oil-developing enterprise may be determined by authorization of individual owners of two-thirds of the entire acreage included in the lease. It appears that the first notice to surrender possession was signed by owners of land representing more than four-fifths of all the acreage included in the original lease. There is a prima facie showing that the five owners of land who signed the last-mentioned notice were authorized to act in behalf of the original lessors as their agents in recovering possession of the land. Mr. Moon testified regarding the authorization of the five individuals who signed the last-men-

tioned notice that "Those people were elected as directors and served as a board." Moreover, a third notice to vacate the premises, signed by "W. H. Heavey, Manager, Ann Heavey Estate," was served March 8, 1936, on the appellant M. M. Marker, who was the manager of the appellants' oil well enterprise on section 31 of the property. We conclude that no notice to surrender possession of the premises was necessary under the circumstances of this case, but that adequate notice thereof was nevertheless given.

[4] There is no merit in the appellants' contention that there is a lack of proof that they were in actual possession of the property. They admitted that fact. Their joint answer affirmatively alleges that, "These defendants were and now are in possession of said real property." In the examination of M. M. Marker, the manager, of appellants' oil-prospecting enterprise, under the provisions of section 2055 of the Code of Civil Procedure, the following colloquy occurred:

"Q. Are you in possession of any lands under this lease at this time or claim to be? * * * A. Yes, we do claim to have possession. * * *

"Q. Do you claim that you are rightfully in possession? A. Yes sir."

It appears that the derrick and some of the equipment used in drilling the well remained on the premises. That apparatus belongs to the appellants. There is adequate proof of appellants' possession of section 31 of the property.

[5] It is immaterial that the complaint designated "Marker Drilling Company" as one of the defendants in the action, and that default was entered against that company. Undoubtedly the plaintiffs assumed the appellants were operating their oil-drilling enterprise in that fictitious name. M. M. Marker was served with process as president of that company. The evidence, however, indicates that no such company existed. Judgment was not entered against it. The five appellants appeared as individuals and jointly answered the complaint. They are not prejudiced by the ineffectual proceeding of including as a party defendant a fictitious company which all parties concede did not exist. That proceeding was as harmless as the usual proceeding of designating as party defendants in certain cases the proverbial John Doe and Richard Roe.

The findings and judgment to the effect that the owners of section 31 of the land in question are entitled to the possession thereof are sufficiently supported by the evidence. The record satisfactorily shows that the ten-year lease expired two months before the action was commenced; that operations on the only oil well which was drilled on the property were abandoned seven months before the expiration of the term of the lease; and that neither oil nor gas was produced thereon in paying quantities. These circumstances automatically terminated the lease January 31, 1936, and the owners of the land were then entitled to possession thereof.

[6, 7] It is contended there is a fatal variance between the allegations of the complaint and the evidence adduced with respect to the ownership of the property. We think not. The complaint alleges that plaintiffs are the owners and entitled to the immediate possession of certain real property situated in Tehama county, Cal. It is then stated: "Each particular tract owned by each of the foregoing lessors being individually described, as follows, to-wit:" Each description of separate tracts of land is immediately preceded by the names of the owners thereof. The names of individuals preceding the description of land in section 31, claimed by the appellants, are the identical persons found by the court to be the owners thereof. Those findings are supported by the evidence. There is no variance in that regard. There appears to be no uncertainty as to the ownership of the land involved in this suit. If there is any such uncertainty the appellants waived that defect by failure to demur to the complaint.

[8, 9] The appellants contend that since this action was not brought by all of the original lessors of the joint lease of the entire tract of 45,126 acres of land the judgment is erroneous and ineffectual to terminate the lease against them. In support of this assertion they rely on the cases of Jameson et al. v. Chanslor-Canfield Midway Oil Company, 176 Cal. 1, 167 P. 369, 372, and Jones v. Pier, 124 Cal.App. 444, 12 P.2d 646. We are of the opinion those cases have no application to the facts of the present suit, for the reason that they were based on actions to terminate joint interest in existing community leases for alleged breaches thereof. The Jameson Case sought to quiet title to an undivided three-fourths interest in

80,000 acres of land for an alleged breach of a lease thereto occurring during the term of that instrument. The court properly held that two of the three joint owners of the property could not declare a forfeiture of the lease without uniting the third owner as a party to the action. No separate ownership of property was alleged or proved in that case. It is apparent the alleged breach of the lease in that case might have been waived by the third owner who was not a party to the action. In the Jones Case, supra, this court held that plaintiff, as the assignee under a joint lease of 1 per cent. interest in the oil and gas produced from certain land, was entitled to have his title thereto quieted. For the purpose of defeating his interest, a judgment which was previously rendered in another action brought by only two of the four joint lessors of the land was received in evidence. The previous judgment purported to cancel the lease for alleged breach thereof occurring during the term of that instrument. This court held that the previous judgment did not terminate the lease so as to estop Jones from asserting his interest in the oil and gas produced from the land for the reason that his assignor, who was one of the joint lessors, was not a party to the former action. In that regard we quoted with approval from the Jameson Case, supra, as follows: "A right given to several lessors, by a contract of lease, to declare a forfeiture for breaches of the character here involved must be exercised by all and cannot be exercised by less than all."

That is a sound principle of law, but it has no application to the present case.

If separate owners of different parcels of land join in one community lease of their several properties for the purpose of developing oil and gas thereon, and pool their interests in the proceeds therefrom, they must all join in an action to cancel the lease during its prescribed term, for any alleged breach thereof which renders a forfeiture of the instrument optional. The failure of one joint lessor to become a party to such an action to forfeit the lease for breach of its terms may furnish evidence of a waiver of that breach. The waiver of a breach by one joint lessor may be deemed to be a waiver by all. But when a lease has actually terminated by lapse of its prescribed term, and the contract has come to an end, there is no reason why a separate owner of land who was a party to the expired joint lease may not maintain an action in ejectment to recover possession of his own land without joining in that suit all of his former joint lessors. When the joint contract is ended and the joint oil-prospecting enterprise is terminated, the former joint lessors have no further interest in a suit to acquire possession of real property to which they have no title.

This case does not involve the forfeiture of a joint lease of oil lands for alleged breaches thereof during its prescribed term. It is not an action to terminate a lease. It is a mere possessory suit to restore real property to its rightful owners after the expiration of a lease which terminated by lapse of its prescribed term. We are satisfied it was not necessary for all of the original joint lessors of the entire 45,126-acre tract of land to join the plaintiffs in this suit to recover possession of section 31 of that property, in the title to which they had no interest. After the expiration of the joint lease none of the lessors of section 31, except the separate owners thereof, had any interest in that property by the terms of the lease or otherwise. All of the owners of the property involved in this appeal are parties to this action. The appellants are not prejudiced by failure to join as plaintiffs in this ejectment suit other individuals who absolutely have no interest in the land in question.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

25 Cal.App.2d 680

REEVES v. LAPINTA et al.

Civ. 11715.

District Court of Appeal, Second District, Division 2, California.

April 13, 1938.

Rehearing Denied May 4, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Appeal and error 🔑934(1)

The reviewing court must view the evidence most favorable to the plaintiff in reviewing a judgment predicated upon the granting of defendants' motion for judgment non obstante veredicto.

2. Negligence 🔑6, 82

The violation of a statute or ordinance constitutes negligence per se, and the violation constitutes contributory negligence if failure to comply with statute or ordinance contributes directly to the plaintiff's injury.

3. Carriers 🔑331(5)

A bus passenger who stood on step of bus, the exit door of which was open, and was injured when bus gave sudden jerk and threw passenger to street, was guilty of contributory negligence as matter of law, in view of ordinance prohibiting persons from riding on steps of any street car or vehicle.

4. Appeal and error 🔑1001(1)

Generally, contributory negligence is an issue for trier of facts, and determination of fact trier will not be disturbed upon appeal if there is any substantial evidence to sustain it.

5. Negligence 🔑136(31)

Where violation of a statute or ordinance contributes directly to plaintiff's injury, the issue of contributory negligence is not one of fact, but is an issue of law and is removed from the consideration of the trier of facts.

6. Carriers 🔑347(8)

Where ordinance prohibited persons from riding on steps of any street car or vehicle, the issue of contributory negligence of bus passenger who stood on step of bus, the exit door of which was open, and who was injured when bus gave sudden jerk and threw passenger to street, was not issue of fact for trial jury, but was issue of law for the court.

◆

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Nella Reeves against John Lapinta, doing business under the firm name and style of San Pedro Motor Bus Company, and another for injuries sustained by the plaintiff while she was a passenger on a bus owned and operated by the defendants. From a judgment for defendants predicated on granting of defendants' motion for judgment notwithstanding verdict of jury, the plaintiff appeals.

Affirmed.

David A. Fall, of San Pedro, for appellant.

Clifton A. Hix, of San Pedro, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants predicated upon the granting of defendants' motion for a judgment notwithstanding the verdict of the jury, section 629, Code Civ.Proc., as amended by St.1935, p. 1947, in favor of plaintiff in an action to recover damages for personal injuries.

[1] Viewing the evidence most favorable to plaintiff, as we must in reviewing a judgment predicated upon the granting of defendants' motion for a judgment non obstante veredicto, Myers v. Southern Pacific Co., 14 Cal.App.2d 287, 292, 58 P.2d 387, the material facts are these:

On January 30, 1937, plaintiff was a passenger in an automobile bus owned and operated by defendants, which was traveling in a westerly direction on Elberon street in the San Pedro district of the city of Los Angeles. As the bus approached the intersection at Elberon and Cabrillo streets, plaintiff arose from her seat, walked to the front of the bus, and stood on the step of the bus as it traveled along the street; the exit door being open at the time. The bus gave a sudden jerk, and plaintiff was thrown to the street and injured.

These are the questions presented for determination:

First. Was plaintiff contributorily negligent as a matter of law in riding upon the step of the automobile bus?

Second. Was the issue of plaintiff's contributory negligence one which should properly have been left to the determination of the trial jury?

[2] The first question must be answered in the affirmative. The law is settled

that (1) the violation of a statute or ordinance constitutes negligence per se, and (2) it constitutes contributory negligence if the failure to comply with the statute or ordinance contributes directly to the plaintiff's injury. Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 147, 52 P.2d 922; Leek v. Western Union Tel. Co., 20 Cal.App.2d 374, 376, 66 P.2d 1232.

In the instant case at the time of the accident section 80.47 of the Municipal Code of the city of Los Angeles read: "No person shall ride upon the fender, *steps,* or running board of any street car or vehicle." (Italics added.)

[3] As plaintiff violated a provision of the foregoing ordinance in riding upon the step of the automobile bus, she was guilty of negligence per se, and since the accident would not have occurred had plaintiff remained in any other portion of the bus, her negligence was one of the proximate causes of the accident, and therefore she cannot recover for her injury. Steinberger v. California Electric Garage Co., 176 Cal. 386, 394, 168 P. 570; Leek v. Western Union Tel. Co., supra; section 1714, Civ. Code.

[4-6] The second question must be answered in the negative. It is the general rule that the issue of contributory negligence is one to be left to the determination of the trier of fact, and that such determination will not be disturbed upon appeal, if there is any substantial evidence to sustain it. This general rule, however, is subject to this well-established exception: If the violation of a statute or ordinance contributes directly to plaintiff's injury, the issue is not one of fact but is an issue of law, and is therefore removed from the consideration of the trier of fact. In Lorry v. Englander Drayage, etc., Co., 108 Cal.App. 116, 118, 291 P. 467, 468, the rule is accurately stated thus: "In the absence of the ordinance, the question of whether appellants were negligent in riding on the running board would depend upon whether a person of ordinary prudence would have so ridden under the circumstances then existing, and this would have been a question properly to be left to the jury. Ivancich v. Davies, 186 Cal. 520, 199 P. 784; Strong v. Olsen, 74 Cal.App. 518, 241 P. 107. *But the ordinance enacted an absolute standard of conduct,* and removed from the jury the right to speculate as to what that ideal composite the man of ordinary prudence might or might not have done under similar circumstances. *It thereby substituted certainty of conduct for uncertainty. If the violation of the ordinance proximately contributed to their injuries, appellants were guilty of negligence as a matter of law.*" (Italics added.)

See, also, Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 527, 54 P.2d 49.

For the foregoing reasons, the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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25 Cal.App.2d 675

LINDENBERG v. BRODEK.

Civ. 11556.

District Court of Appeal, Second District, Division 2, California.

April 13, 1938.

Appeal and error 🔑787

An appeal in which the clerk's and reporter's transcripts were filed on July 28, 1937, and which was thereafter taken from the calendar by the parties on stipulation in the hope of making settlement, was dismissed without opposition on April 13, 1938, for want of prosecution.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Fred Lindenberg against Adolph Brodek, as administrator of the estate of Fritz Rosenstein, deceased. From an adverse decision, defendant appeals.

Appeal dismissed.

Chas. I. Rosin, of Los Angeles, for appellant.

Chenoweth & Whitehead, of Los Angeles, for respondent.

PER CURIAM.

Upon the hearing on order to show cause why the appeal herein should not be dismissed for want of prosecution, the presiding justice in open court made the following statement: "In this case the court itself has served upon the appellant an order to show cause why the appeal should not be dismissed for want of prosecution. The clerk's and reporter's transcripts were filed July 28, 1937. Thereafter the parties entered into a stipulation taking the case off calendar, in the hope of making settlement. This court has waited sufficiently. There is no opposition, and the motion is granted."

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25 Cal.App.2d 699

NILSSON v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 5949.

District Court of Appeal, Third District, California.

April 13, 1938.

Rehearing Denied May 13, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Officers 🔑11, 26(1), 69

The Civil Service Act does not require that the minutes of meetings of the Civil Service Commission should contain information in regard to examinations, appointments, eligible lists, dismissals, promotions, increases or reductions in salaries, or other petty details regarding state employees. St.1913, p. 1035 et seq., as amended.

2. Officers 🔑11

Under requirement of the Civil Service Act that the commission keep a roster of all persons holding positions under the act, it was duty of the chief of the division of personnel and organization to make a notation upon the roster of a temporary extension of an appointment of an employee. St.1913, p. 1045, as amended by St.1919, p. 1347.

3. Evidence 🔑83(1)

Where the roster card of a temporary appointee to a position under the Civil Service Commission contained a notation that the appointment had been extended, and there was no proof that the notation had not been made under the direction of an officer qualified to make it, presumption became evidence of the fact that the notation was so made. St.1913, p. 1045, as amended by St. 1919, p. 1347; Code Civ.Proc. § 1920.

4. Evidence 🔑97

The burden of proof that an officer did not perform his duty is upon one asserting such irregularity.

5. Officers 🔑76

Where civil service employee was temporarily appointed on January 3, 1932, for three months, employee's roster card was noted "extended until eligibles appointed, C.S.C. 9/15/32," minutes of meeting of commission did not refer to extension, at least two members of the commission, approved the extended appointment, roster card indicated that employee acquired civil service status on December 20, 1934, and was dismissed January 18, 1935, by his immediate superior, and record also indicated that from January, 1932, through January, 1935, commission had found employee to be lawfully holding his position and salary was paid accordingly, employee was entitled to reinstatement and to recover salary from date of dismissal. St.1913, p. 1035 et seq., as amended; St.1919, pp. 1346, 1347, §§ 11, 16; Code Civ.Proc., § 1920; Const. art. 24, § 5(e), adopted Nov. 6, 1934.

6. Officers 🔑69

A letter written by the Director of Agriculture, in whose department the civil service employee was working, authorizing his chief accountant to sign all claims, checks, or documents relating to finance, civil service, or any items affecting the accounting office, did not vest the accountant with power to dismiss employee. St.1913, p. 1035 et seq., as amended; p. 1041, § 9.

7. Officers 🔑69

The procedure for dismissal of a civil service employee must be strictly followed in order to be effective. St.1913, p. 1041, § 9.

8. Officers 🔑69

A civil service appointee who had acquired the status of a probationer was entitled to have the statutory procedure for dismissal strictly followed. St.1913, p. 1035 et seq., as amended; p. 1041, § 9.

9. Officers 🔑76

Proceeding by equipment inspector in Division of Weights and Measures of Department of Agriculture, who had acquired the status of a probationer, to require the payment of back salary and restoration to position from which he was dismissed *held* not barred by laches.

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Petition for a writ of mandate by J. Leonard Nilsson against the State Personnel

Board of the State of California and others to reinstate petitioner to the position of equipment inspector in the Division of Weights and Measures of the Department of Agriculture, and to require the payment to him of salary from January 18, 1935. From a judgment granting the writ, defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellants.

Albert E. Sheets, of Sacramento, for petitioner.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment granting a writ of mandate to reinstate petitioner to the position of equipment inspector in the Division of Weights and Measures of the Department of Agriculture, and requiring the payment to him of his salary of $150 each month from January 18, 1935.

On January 3, 1932, petitioner was appointed weighing and measuring equipment inspector at $150 a month under a temporary authorization granted by the State Civil Service Commission for a period of three months, or until April 4, 1932. Such appointment was made under the provisions of section 11 of the State Civil Service Act, St.1913, p. 1043, as amended by St.1919, c. 654, p. 1346, Deering's Gen.Laws, Act 1400, which provided that where there was no eligible list from which a position could be filled, the appointing power, with the consent of the Civil Service Commission, might fill such position by temporary appointment, such temporary appointment, however, not to continue for a period longer than three months, nor could successive temporary appointments be made to the same position without the previous consent of the commission, and that no person could hold a position under such successive temporary appointments for a longer period than six months without the unanimous consent of the commission.

The commission keeps a roster similar to a card index system, under the provisions of section 16 of the Civil Service Act, St. 1913, p. 1045, as amended by St.1919, p. 1347, by which the commission is directed to keep such roster of all persons holding positions under the Civil Service Act, and must show in connection with each name the date of appointment, promotion, reduction, transfer, change, or separation from position, etc. Upon the roster card of petitioner is found a notation, "extended until eligibles appointed, C.S.C. 9/15/32," although nothing is found in the minutes of September 15, 1932, referring directly to the temporary extension of the appointment of respondent.

In regard to the foregoing notation found on the card, the chief personnel technician testified that about September 2, 1932, a request was sent to the individual members of the Civil Service Commission and the chief of the division of personnel and organization for the approval of various temporary appointments, including that of petitioner, and in due time approval was received from at least two of the members, and the notation made accordingly.

From the roster also it was indicated that petitioner was given a temporary appointment January 4, 1932, and acquired civil service status December 20, 1934, by virtue of the provisions of section 5 (e) of article 24 of the Constitution, and was dismissed January 18, 1935.

On November 25, 1933, an examination was held for the position of weighing and measuring equipment inspector, and the eligible list created thereby was announced July 25, 1934. On that list petitioner stood eighth. Some time in 1933, the Director of Agriculture, in whose department petitioner was working, wrote to Mr. Levers, his chief accountant, as follows: "This letter is to authorize you as chief accountant and secretary to sign all claims, purchase estimates, forms, checks or documents that relate to finance, civil service, or any items of a general nature affecting the accounting office."

In December, 1934, the Director of Agriculture instructed Mr. Tucker, chief of the division of weights and measures, to follow the provisions of the Civil Service Act, and to work out any changes necessary with Mr. Levers, as it was necessary, through lack of funds, to reduce their personnel. Acting upon instructions from Mr. Levers, Mr. Tucker, petitioner's immediate superior, advised him by letter, dated December 29, 1934, that for reasons of economy and efficiency the services of the Division of Weights and Measures had to be curtailed and the personnel reduced, and that petitioner, after taking the vacation to which he was entitled, would terminate his services January 18, 1935. A report of this separation was filed by the Civil Service Commission on January 22, 1935. The foregoing constitutes briefly the facts here involved.

It is the contention of appellant, first, that after April 4, 1932, petitioner never lawfully held a position with the state, and thereafter had no rights under article 24 of the Constitution nor the Civil Service Act.

It is undisputed that petitioner received a temporary appointment under the provisions of section 11 of the Civil Service Act, as amended, for a period of three months, or until April 4, 1932. On September 15, 1932, the notation hereinbefore referred to was made upon the roster card, which purported to extend the term of service until eligibles were appointed. Appellant, however, contends that this entry was only an informal notation, and that evidence of the action of the commission must be found in the official minutes. An examination of the minutes of the meeting held on September 15, 1932, are silent as to any action taken by the commission in regard to the extension of the temporary appointment of the petitioner, although it will be recalled from the testimony of the chief personnel technician, that the entry on the roster card was placed thereon after the request had been sent to the individual members of the Civil Service Commission asking for the approval of the temporary appointments of the various employees, including that of petitioner.

Section 11 of the Civil Service Act, supra, provides conditions and terms of service under which temporary appointments may be made to fill positions when there is no eligible list for such positions, and appellant points out that the records disclose the original temporary appointment here was made on January 4, 1932, which terminated April 4, 1932, and that the record is silent as to any other or successive appointment of the petitioner. It is also pointed out that but two of the members of the commission acted in regard to the appointment of petitioner on September 15, 1932, and that there appears to be a gap from April 2, 1932, to September 15, 1932, wherein there is found no authority for the employment of petitioner.

Petitioner replying to this contention maintains that the roster being kept under the provisions of the Civil Service Act, § 16, as amended, and being the official record of the commission relative to a state employee, is prima facie evidence of the facts stated therein. Section 1920 of the Code of Civil Procedure provides: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."

[1] To this argument appellant replies that the minutes of the meeting of the Civil Service Commission held September 15, 1932, contradicts the roster card, in that the minutes fail to show any action in reference to petitioner, and that no such action was taken. However, we find no requirement in law that the minutes should contain this information in regard to examinations, appointments, eligible lists, dismissals, promotions, increases or reductions in salaries, and numerous other petty details regarding state employees.

An examination of petitioner's roster card also reveals that beginning with January, 1932, and continuing from that time to and including January, 1935, there was a check after each month which indicated, as shown by an officer of the commission, that petitioner's status had been checked by the commission and he had been found to be lawfully holding such position, and his salary paid accordingly.

[2-4] It was the duty of the chief of the division of personnel and organization to make an extension of petitioner's appointment upon the roster, and it would appear that such notation had been made. In the absence of proof that such notation had not been made under the direction of such officer, the presumption becomes evidence of that fact, that an official duty has been regularly performed. The burden of proof that an officer did not perform his duty is upon one asserting such irregularity. Hackett v. Morse, 45 Cal.App. 788, 188 P. 308; In re Kent's Estate, 6 Cal.2d 154, 57 P.2d 901.

Petitioner introduced evidence through the office of the state controller that his name appeared upon the pay rolls of the Division of Weights and Measures of the Department of Agriculture. This pay roll required a certification by the Civil Service Commission that all persons named therein were holding positions as provided by the Civil Service Act; it also required a certificate by the Department of Agriculture through the chief disbursing officer, that the pay roll was correct, and that the work had been actually performed on the days and during the months specified, and that the individuals whose names appeared therein were employed in accordance with law, which certificate was attached each month.

Petitioner does not rely entirely upon presumptions and the burden of proof in order to support his position, but points out evidence in the record to show that the Civil Service Commission and the chief of the division of personnel and organization acted in extending his appointment. Mr. Kroeger, chief personnel technician, testified in regard to the notation on the roster "extended until eligibles appointed" that a memorandum was sent to the individual members of the Civil Service Commission and the chief of the division of personnel and organization, asking for the approval of temporary employment of various individuals, including Mr. Nilsson.

This witness explained how the entry was made extending petitioner's status until eligibles were appointed. Memorandums were sent to members of the Civil Service Commission, and to the chief of the division of personnel and organization, asking for the approval of various temporary authorizations, including petitioner. That memorandum was returned with the approval of two members of the commission, and inasmuch as Mr. Kroeger was acting for Mr. Brownrigg, the chief of the division of personnel and organization, notice of the request was, presumably at least, given Mr. Brownrigg. Then, as the witness stated, "* * * acting upon the informal approval of the members, the entry was made on the card."

[5] Mr. Kroeger also testified that after examining the records and checking the status, as his department was commanded to do by the Civil Service Act, St.1913, p. 1035 et seq., as amended, Mr. Nilsson was found qualified, and so noted the fact on the roster. It was upon such undisputed evidence the trial court found that petitioner was the lawful holder of his position, and had been for six months prior thereto, and had obtained civil service status, a finding we believe fully supported by the evidence, and in accordance with law.

[6-8] Furthermore, it is argued by petitioner that he was never lawfully dismissed from his position in the state service. The letter hereinbefore referred to from the director of the Department of Agriculture to Mr. Levers, did not vest in him the power of dismissal, but apparently related only to the work of the accounting office, and contained no statement conferring general authority to act in any manner of appointment or dismissal. In Garvin v. Chambers, 195 Cal. 212, 232 P. 696, the court laid down the rule which holds that procedure for dismissal must be strictly followed to be effective, a principle which has been frequently repeated, and therefore, petitioner having acquired the status of a probationer was entitled to have the statutory procedure for dismissal strictly followed. The Civil Service Act, § 9, St.1913, p. 1041, which provides the method of procedure for dismissal of a probationer, reads: "Unless such appointee shall have been dismissed within such probationary period by the appointing power, for reasons stated in writing and filed with the commission, his appointment shall become permanent, subject to the provisions of this act as to removals, suspensions and changes."

As to what constitutes reasons as referred to in section 9 of the act, we find in rule 9, section I, of the Civil Service Commission: "If during the probationary period the conduct or capacity of the probationer has not been satisfactory to the appointing power, the probationer may be dismissed in the discretion of the appointing power, and the appointing power shall inform the executive member of the commission in writing of the reasons for such dismissal."

Here we find no reasons relating to the conduct or capacity of the petitioner stated in writing as a ground for dismissal. In fact, the record discloses no reason that could be given for such dismissal.

[9] As to the question of laches advanced by appellant, the findings of the trial court are against such contentions, and having in mind the rule as laid down in the case of La Shells v. Hench, 98 Cal.App. 6, 276 P. 377, we believe that no laches has been or can be shown.

For the reasons stated, therefore, the judgment of the trial court should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

25 Cal.App.2d 732

SCHUMACHER v. TAFT UNION HIGH SCHOOL DIST. et al.

Civ. 1868.

District Court of Appeal, Fourth District, California.

April 15, 1938.

1. Mandamus ⚷172

In tenure teacher's action to compel reinstatement on ground that dismissal upon discontinuance of particular kind of service which teacher had rendered was not in good faith, sole question was whether reason assigned by school district for teacher's dismissal was in fact true, or whether ground of discontinuance of particular kind of service was merely a subterfuge to invoke provisions of statute authorizing dismissal under such circumstances. School Code, § 5.710.

2. Appeal and error ⚷1010(1)

Findings of trial court sustained by the evidence will not be disturbed.

3. Mandamus ⚷168(4)

In tenure teacher's action to compel reinstatement on ground that dismissal upon discontinuance of particular kind of service was mere subterfuge to invoke statute authorizing dismissal under such circumstances, evidence showing that elementary machine shop and advanced machine shop practice course taught by teacher was abolished and a vocational course in oil field machinery substituted, which was essentially different than previously taught course, justified finding that teacher's dismissal was authorized. School Code, §§ 3.805, 5.710.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Mandamus proceeding by Jay Schumacher against Taft Union High School District and others, to compel petitioner's reinstatement as a permanent teacher in the Taft Junior High School. From an adverse judgment, plaintiff appeals.

Affirmed.

Claflin, Dorsey & Campbell, of Bakersfield, for appellant.

Siemon & Claflin, of Bakersfield, for respondents.

JENNINGS, Justice.

This is an appeal from a judgment denying to petitioner a writ of mandate to compel the respondents to reinstate him as a permanent teacher in the Taft Union High School.

Jay Schumacher was appointed by the Taft Union High School District in September, 1926, to serve as a teacher in the machine shop and in the sheet metal and blacksmith shop of the high school and junior college of said district. He continued to serve in this capacity for one or two years, when the work of the machine shop increased to such an extent that another teacher was employed to teach in the sheet metal and blacksmith shop, and Schumacher was transferred to the machine shop. In due time petitioner acquired a permanent status under the Teacher's Tenure Law. Section 3.805 of the School Code of 1929 provided that: "In addition to other subjects of instruction each high school course of study may include training in athletics, military drill, and tactics, manual training [etc.], or other vocational work." Apparently the character of service which petitioner was then rendering was thereby classified as training in vocational work. In 1930, an effort was made to reorganize the course of training which petitioner was giving. The primary purpose of such reorganization was to secure state aid funds. The endeavor was successful and state aid was made available to the school for a period of two years. However, in 1932, state aid ceased. The evidence indicates that the cessation of such financial assistance was due to shortening of hours of instruction and discontinuance of technical related work. In any event, upon the cessation of state aid the school district discontinued the particular course in vocational training which had been in effect during the 2-year period. Thereupon, a course of instruction which was apparently denominated the "Aviation and Machine Shop Course" was substituted for the course in vocational training which had been abandoned and such substituted course was given by the petitioner for a period of two or three years. On May 7, 1935, the respondents, as trustees of the Taft Union High School District, ordered that the aviation and machine shop course be closed and that petitioner be notified that his services would not be required for the ensuing school year. Petitioner was thereafter notified of his dismissal on the stated ground of discontinuance of a particular kind of service. On July 16, 1935, the defendant board of trustees, by unanimous vote, adopted a plan for the reorganization of the machine shop and aeronautics course.

The complaint which was originally filed by the petitioner contained no allegations negativing the actual discontinuance in the schools of the particular kind of service which the petitioner had been performing or alleging that the action taken by the respondents in dismissing petitioner in May, 1935, and in subsequently refusing to allow him to resume his position as a teacher was arbitrary and not done in good faith. After the actual trial of the case was concluded and it had been submitted for decision, the trial court on motion duly made permitted petitioner to file an amendment to his petition wherein it was alleged that there had in fact been no discontinuance of the particular kind of service which petitioner had been rendering in the schools, and that the action of respondents in dismissing him and in refusing to permit him to continue in his work as a teacher was arbitrary, capricious, and not taken in good faith.

The sole contention advanced by appellant as ground for reversal of the judgment is that certain material findings made by the trial court are lacking in evidentiary support. The findings which are thus attacked are those wherein the trial court found that the allegations contained in the amendment to the petition are not true, that the course of instruction given by appellant was in fact discontinued at the end of the school year of 1934–1935, and that appellant's dismissal from his position as teacher in the schools involved was made necessary by the discontinuance of a particular kind of service in the respondent school district.

[1] Examination of the record upon which this appeal is presented impels the conclusion that appellant's contention of evidentiary insufficiency is not sustainable. The sole question at issue before the trial court was whether or not the reason assigned by the respondents for appellant's dismissal was in fact true or whether the specified ground of discontinuance of a particular kind of service was, as appellant maintained, merely a subterfuge whereby respondents sought to invoke the provisions of section 5.710 of the California School Code as it existed at the time the action which resulted in appellant's dismissal from his position as teacher was taken by respondents. The cited section of the School Code then provided that: "Whenever it becomes necessary to decrease the number of permanent employees in a school district on account of a decrease in the number of pupils attending the schools of such district, or on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss such employee at the close of the school year." If the assigned reason for appellant's dismissal was in fact true and there was a discontinuance of the particular kind of service which appellant was rendering, then respondents were authorized to order appellant's dismissal and the petition for the writ was properly denied. If, on the other hand, the reason stated was not in fact true, but was used by respondents merely as a subterfuge to enable them arbitrarily to discharge a permanent employee of the school district, then appellant's petition for reinstatement was proper and should have been granted.

[2] The record shows that during the trial of the action appellant took the position which he endeavored to sustain by evidence which he produced that the course of instruction which, at the beginning of the school year of 1935–1936, was substituted for and given in place of the course which he had been giving during the preceding school year was not in fact a different course of training, but to all intents and purposes was the same course which he had theretofore given. Inspection of the record demonstrates that evidence was offered by appellant and was admitted which tended to show that the two courses were identical. However, since the trial court made findings which did not accord with appellant's position and which in effect found that the two courses were not identical but were in fact different, these findings must be sustained unless it must be declared that they are entirely lacking in evidentiary support. Careful review of the entire record has produced the conviction that such a declaration is not warranted. Some reference to evidence which was before the trial court and which, in our opinion, supports the criticized findings may properly be made.

In the first place, it is apparent that the individual respondents as trustees of the school district desired and proposed that during the school year of 1935–1936 a course of instruction in machinery should be given which would have particular reference to the oil industry, an important industry in the territory in which the schools here involved are located. This is made evident by the outline for the new course which was prepared by the district superintendent of the Taft Union High School and the junior college with the aid of the dean of the last-mentioned institution. The outline is entitled "Oil Machinery—Operation, Upkeep, and Repair." The objectives of the course as stated in the outline all have especial reference to the oil industry. Much of the machinery which is mentioned in the outline is machinery which is readily cognizable to a layman in the oil industry as being peculiarly adapted to the industry and which common knowledge indicates is generally used in such industry. Particular reference may properly be made, for example, to the following terminology which occurs in the outline: "Drilling Machinery," "Production Machinery," "Pumps," "Gas Traps." The purpose and intent of respondents is made clearer and more evident by a report which was received in evidence and which showed that it was prepared by the district superintendent, the vice principal of the high school, and the dean of the junior college. The title of this document will suffice to indicate its character. It is as follows: "Development of the Technical Institute Course In Oil Machinery Operation, Upkeep and Repair, at the Taft Union High School and Junior College."

In fairness to appellant it should be observed that throughout his testimony he consistently maintained that the course of instruction which he had given also had special reference to the oil industry, and that by means of frequent trips to the nearby oil fields which the students made under his supervision they were enabled to make first-hand observations of the machinery used in the oil industry. He also testified that in the lectures which he gave and in the lessons which he assigned emphasis was placed on the machinery which is used in the aforesaid industry. It is, however, deserving of mention that appellant testifying in his own behalf admitted on cross-examination that in the course which he gave rather superficial instruction was afforded as to the use of certain well-known machinery and appliances employed in the oil industry. It may further be noted that in the outline of the course of instruction given by appellant, which outline he testified he prepared, there is no reference to any machinery which is peculiar to the oil industry. The objectives of the course as stated in this outline are as follows: "To develop the skills necessary to use hand tools wisely," and "To further the development of the use of hand wisely." It is true that appellant testified that the outline was a very meager outline, "as demanded by the administration, so we could put it in their year book, the course of study, so the boy would have an idea what he was going to do." However, it should be observed that when appellant was asked what course he had taught during the school year 1934–1935, he replied as follows: "Elementary machine shop and advanced machine shop practice." The evidence produced during the trial indicates that the description thus given was fairly accurate, and that the course which appellant gave was designed to train the students in the use of machinery generally without special emphasis being placed on the use of such machinery as is peculiarly adapted to the oil industry. It is also apparent from the evidence that the new course which was installed at the beginning of the school year of 1935–1936 was more limited in its scope than the course which it superseded, that it was designed to furnish specialized training, and that its purpose and object was to equip the student for work in a particular industry, viz., the oil industry. It is deserving of mention that when appellant was asked on cross-examination to state the difference between a general machine shop course and a vocational course, he gave the following answer: "A general machine shop course is to acquaint the student for an avocation as a hobby with him. The vocational course would prepare him for a place in the industry." In our opinion this was an intelligent differentiation of the two courses of instruction which were being considered by the trial court for the purpose of discovering whether or not there had in fact been a discontinuance of the particular kind of service which appellant had been rendering.

[3] Since it is apparent that evidence was produced during the hearing which justified the trial court in making the findings of which appellant complains, it follows that these findings may not be dis-

turbed, and that the judgment rendered in conformity with such findings is proper.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

25 Cal.App.2d 746

TILTON v. BOARD OF EDUCATION OF POMONA CITY HIGH SCHOOL DIST. et al.

Civ. 11390.

District Court of Appeal, Second District, Division 1, California.

April 18, 1938.

1. Schools and school districts 🔑141(1)

The word "dismissal" in statute providing that retirement automatically effects the dismissal of school teacher at end of current school year refers to the termination of the status of a permanent teacher. School Code, § 5.665, as added by St.1931, p. 1398.

[Ed. Note.—For other definitions of "Dismissal," see Words & Phrases.]

2. Schools and school districts 🔑144(3), 146

A school board justified in retiring a teacher because of physical disability to perform her duties must remove teacher from classroom, and teacher cannot receive salary for the time intervening between her retirement by board and her subsequent automatic dismissal at end of current school year. School Code, § 5.665, as added by St. 1931, p. 1398; § 5.890.

3. Schools and school districts 🔑144(3), 146

A permanent high school teacher who was physically incapacitated as result of a defect in her hearing was properly retired when her incapacity occurred, and she was not entitled to be paid to end of current year, notwithstanding that her retirement did not effect her dismissal until end of current year. School Code, § 5.665, as added by St.1931, p. 1398; § 5.890.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Mandamus proceeding by Blanche A. Tilton against the Board of Education of the Pomona City High School District and others to compel the defendants to reinstate the plaintiff as a high school teacher. From the judgment, the defendants appeal.

Affirmed in part, and reversed in part.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and W. B. McKesson, Deputies Co. Counsel, all of Los Angeles, for appellants.

Raymond G. Thompson, of Pasadena, and Harold A. Ritchie, of Los Angeles, for respondent.

WHITE, Justice.

This is a proceeding in mandate by which the plaintiff, a permanent teacher of the Pomona City High School District in Los Angeles county, sought to compel her reinstatement after she had been involuntarily retired by the defendant Board of Education. After a trial of the issues, the court found and determined that the involuntary retirement was proper, but that it became operative and effected plaintiff's dismissal as of the end of the school year. The judgment of the trial court dissolved the alternative writ of mandate and denied a peremptory writ, and then provided: "That the defendant, Board of Education of the Pomona City High School District pay to plaintiff $1,800, and order a warrant drawn in her favor for that amount." From this part of the judgment, defendant Board of Education prosecutes this appeal.

Epitomized, the facts are that plaintiff was a permanent teacher of the Pomona City High School District. Since September 9, 1935, the defendant Board of Education has refused to assign her to a position as teacher or to permit her to perform services, except for the days of September 9 and 10, 1935. On the last-named date, the defendant board made and entered its order directing plaintiff's retirement from service, and notice thereof was given to her the same day. It is conceded that plaintiff's salary for the remainder of the school year would have been $1,800, and this was not paid her. The record indicates that plaintiff was retired because of her physical incapacity, resulting from a defect of her hearing. No question is raised on this appeal regarding the propriety of the plaintiff's retirement, either as to her eligibility therefor, or the physical facts which necessitated such retirement, nor as to the propriety of the procedure by which she was retired; and the sole question for consideration by us is whether an involuntary retirement of an eligible employee, pursuant to the provisions of section 5.890 of the School Code, can be made at the instant the incapacity of the employee occurs, or whether the retirement must be deferred to the end of the then current school year.

The sections governing retirement and in effect at the time this case arose, and which are here involved, provide:

"Every public school teacher who shall have complied with all the requirements of this Part, and who shall have served under a legal certificate as a legally qualified teacher in public day or evening schools * * * for at least thirty school years, at least fifteen of which shall have been in the public schools of this state including the last ten years of service immediately preceding retirement, shall be entitled to retire; or if physically or mentally incapacitated for the proper performance of the duties of teacher, may be compelled to retire by the board of education, school trustees, or other school authorities employing such teacher." School Code, § 5.890.

"The retirement of any employee of a school district under the provisions of any retirement law now in effect or hereafter enacted shall automatically effect the dismissal of such employee from the employ of the district at the end of the then current school year." School Code, § 5.665, as added by St.1931, p. 1398.

[1] It will be noted that the last-named section does not refer to the date when the "retirement" shall become effective, but provides that such "retirement" shall automatically effect the "dismissal" of the teacher from the employ of the district at the end of the current school year. "Dismissal" refers to the termination of the status of a permanent teacher. In other words, until such dismissal, the teacher retains his tenure and the rights incident thereto. Therefore, the question squarely presented to us for determination is whether or not the retention of such teacher until the end of the current school year carries with it the right to be given active employment from the date when the school board "retires" the teacher until the date of "dismissal" at the end of the current school year as provided for in the School Code section; and also whether the teacher must be paid his full salary for the period between the date when the school board makes its order directing the teacher's retirement and the end of the current school year.

[2, 3] On the authority of Gentner v. Board of Education, 219 Cal. 135, 25 P.2d 824, these questions must be determined adversely to the claims of plaintiff herein. The reasoning in that case dictates the conclusion that where, as in the instant case, the school board was justified in retiring a teacher because of physical disability to perform her duties, it became the board's duty to remove the teacher from the classroom, and she is not entitled to receive salary for the time intervening between her retirement by the board and her subsequent automatic dismissal at the end of the current school year. Such a conclusion finds support in the basic principle underlying our school system—that the welfare of the children is the paramount consideration. Also, the law does not contemplate that public funds shall be expended where no services are performed and where not only is there no duty to accept services tendered, but the welfare of the children requires that such services be dispensed with. In the absence of positive language in the section, or other statutory authority providing that the teacher should receive salary from the date the board enters its order retiring her until the end of the current school year notwithstanding she renders no service, the courts are without power to direct the school authorities to disburse to the teacher public funds.

That portion of the judgment directing the defendant Board of Education to pay to plaintiff $1,800 and decreeing that said board order a warrant drawn in her favor for that amount is reversed. In all other respects, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

30 Cal.App.2d Supp. 773

ROOS v. JANSEN et al.

C. A. 3884.

Appellate Department, Superior Court, Los Angeles County, California.

April 11, 1938.

1. Contracts ⚷208

A contract creating indebtedness is deemed performable at creditor's place of business, in absence of special agreement as to place of performance. Civ.Code, §§ 1488, 1489.

2. Contracts ⚷208

A contract is deemed performable where it is made, in absence of contrary showing.

3. Venue ⚷18

The municipal court of city of Los Angeles had jurisdiction of, and was a proper court for trial of, action to recover $126 due plaintiff's assignor for medical services rendered in such city under contract made therein, though defendants lived in another city of same county. Code Civ.Proc. § 81, as amended by St.1933, p. 1810, and p. 2476; §§ 83, 85, 89, as amended by St.1933, p. 1811; § 112, as amended by St.1935, p. 409; § 395, subds. 1, 2, as amended by St.1933, p. 1840.

4. Venue ⚷75

The municipal court of city of Los Angeles was not justified in dismissing action against residents of another city in same county for balance due for medical services, rendered in former city under contract made therein, for lack of jurisdiction, on defendants' motion, as their remedy was to move for transfer of case to justice's court of township wherein they resided. Code Civ. Proc. § 396, as amended by St.1935, p. 1947; § 396a, added by St.1933, p. 1836, amended by St.1937, p. 336; § 396b, as amended by St.1933, p. 1842.

◆

Appeal from Municipal Court of Los Angeles; Chas. B. MacCoy, Judge.

Action by E. C. Roos against Floyd Jansen and another to recover a balance due plaintiff's assignor for medical services. From a judgment of dismissal, plaintiff appeals.

Reversed.

Joseph Schecter, of Los Angeles, for appellant.

Logan Beamer, of Glendale, for respondents.

BISHOP, Judge.

In the judgment from which the plaintiff has appealed it is recited that a motion to dismiss for lack of jurisdiction had been granted. We are of the opinion that it was error for the trial court to enter a judgment of dismissal for lack of jurisdiction, for it not only had jurisdiction, but there was in the premises no operative limitation upon its right to exercise its jurisdiction, as it appeared to be a proper court for the trial of the case.

In general, the complaint is one for the balance of $126 overdue plaintiff's assignor for medical services. Specifically, it contains four causes of action: The first, one relying on an open book account; the second, alleging an indebtedness for services rendered at the special instance and request of the defendants; the third, setting up an account stated; while the fourth alleged that the indebtedness was upon an open, mutual, and current account. No contention is or may be made that, when tested for jurisdictional purposes, the action is other than an action at law for $126, the four causes of action being but different methods of presenting the one claim of $126.

[1, 2] In order to understand the issues on this appeal, these simple facts must be known. In the complaint it was alleged "that the defendants herein are residents of the City of Los Angeles, County of Los Angeles." This allegation, as were all others, was denied, and on the trial it was made to appear that the respondents (defendants below) did not reside in the city of Los Angeles, but did reside in the city of Glendale, Los Angeles county. The complaint also contained such allegations as these: "That within four years last past * * * in the City of Los Angeles, County of Los Angeles, State of California, the defendants herein became and were indebted to plaintiff's assignor in the sum of $126.00, upon an open book account," and again, "That within four years last past * * * in the City of Los Angeles, County of Los Angeles, State of California, an account was stated between plaintiff's assignor and the defendants herein. * * *" Like statements of place were made in the other counts. The effect of these allegations, used in the common counts, was to declare that the obligations sued upon were contracted to be performed in Los Angeles city. While the trial did not progress to a judgment

on the merits, there was nothing developed, so far as it did go, at variance with the theory of the complaint that the obligations were contracted to be performed in Los Angeles city. Evidence was presented that the agreement for the medical services was orally made in Los Angeles city; the services were performed there; plaintiff's assignor had his office there. In the absence of a special agreement as to the place where a contract is to be performed, it is to be deemed performable at the creditor's place of business, Bank of Yolo v. Sperry Flour Co., 1903, 141 Cal. 311, 317, 74 P. 855, 65 L.R.A. 90, applying sections 1488 and 1489, Civil Code; Kaupke v. Lemoore, etc., Co., 1935, 7 Cal.App.2d 362, 46 P.2d 204, or, in the absence of a contrary showing, a contract is to be deemed performable where it is made. Fitzhugh v. University Realty Co., 1920, 46 Cal.App. 198, 201, 188 P. 1023; Southwestern Portland Cement Co. v. Cochrane, 1931, 114 Cal.App.,Supp., 778, 781, 300 P. 445.

If we understand aright respondents' defense of the judgment of dismissal, it is that when it developed as a fact at the trial that the defendants lived in the city of Glendale, and not, as alleged in the complaint, in the city of Los Angeles, the jurisdiction of the trial court which had appeared to exist was proved to be nonexistent, with the result that no choice remained but to dismiss the action. It may be that this position, which we shall see is quite untenable, was not that taken by the trial judge, but that he believed, when the fact appeared that the defendants resided in Glendale, that he was either authorized or compelled to dismiss the action by virtue of those provisions, hereafter quoted, of section 396a, Code of Civil Procedure, added by St.1933, p. 1836, amended by St.1937, p. 336.

[3] To evaluate properly either respondents' position or the only other position we can think of as being taken in support of the judgment, several sections of the Code of Civil Procedure should be freshly in mind. Since the Legislature, in 1933, at the inspiration of the California Code Commission, revised these sections, they make that which respondents' argument fails to note, a clean-cut distinction between questions of jurisdiction of subject matter and those involving the place of trial. No innovation was made by the 1933 revision in the classification of our trial courts; those of general interest remain as formerly: a superior court in each county of the state, section 6, art. 6, Const.; a municipal court in each city with over 40,000 population that establishes such a court, section 85, Code of Civil Procedure, as amended by St.1933, p. 1811; and justices' courts of class A, in cities, towns, and judicial townships having a population of 30,000 or more, and in those with less than that population, justices' courts of class B, section 81, Code of Civil Procedure, as amended by St.1933, p. 1810, and p. 2476. "In so far as the jurisdiction of municipal and justices' courts is the same, such jurisdiction is concurrent," is the provision of section 83, Code of Civil Procedure, as amended by St.1933, p. 1811. It follows that each municipal court of the state, each justice's court of class A, and each justice's court of class B, would have had jurisdiction to try the action under review, for the jurisdiction of those several courts, with respect to actions at law, is made dependent on the demand, exclusive of interest (or the value of property in question), being, respectively, $2,000 or less, section 89, Code of Civil Procedure, as amended by St.1933, p. 1811, $1,000 or less and $300 or less, section 112, Code of Civil Procedure, as amended by St.1935, p. 409.

In saying that each of these courts would have had "jurisdiction" to try this case, we are using the word "jurisdiction" in the sense in which we understand these sections of the Code to use it. These sections are concerned with questions of jurisdiction and not with the question: Which, of the courts having jurisdiction, is the proper court for the trial of the action? The answer to this last question we look for in part 2, title 4, of the Code of Civil Procedure, which has the heading: "Place of Trial of Civil Actions." There, in section 395, subd. 1, as amended by St. 1933, p. 1840, we find: "When a defendant has contracted to perform an obligation in a particular county, and the demand, exclusive of interest, does not exceed three hundred dollars, either the county where such obligation is to be performed, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." Then later we find, in the same section, subdivision 2: "The proper court for the trial of any such action, in the county hereinabove designated as the proper county, shall be determined as follows: If there is a municipal or justices' court, having jurisdiction of the subject matter of the action, established in the city, city and county, town or judicial township, in which the defendant, or any defendant, so resides, * * * or, in the cases hereinabove mentioned, in which the obligation was contracted to be performed, such court is a proper court for the trial of such action." From these provisions it is plain, and as to this respondent raises no question, that Los Angeles county was the proper county for the trial of this action. It is also clear that if the defendants resided in Los Angeles city and also that was the city in which the obligation was contracted to be performed, then the trial court was the proper court to try the action. If, however, as was made to appear at the trial, the defendants lived in the city of Glendale, but the obligation was contracted to be performed in Los Angeles city, then either the justice's court of Glendale township or the trial court was a proper court for the trial of the case.

[4] So far, it appears that under any theory of the case, that presented by the complaint or that revealed by the evidence, the trial court had jurisdiction of the action. In passing, we may note that whatever the rule may have been, it is now required that an action pending in a court without jurisdiction of the subject matter be not dismissed, but be transferred to a proper court having jurisdiction. Section 396, Code of Civil Procedure, as amended by St.1935, p. 1947. It also appears that whether tested by the complaint or the facts thus far adduced, the trial court was at least one of the proper courts for the trial of the action. But were it true that the trial court was not the proper court, the remedy for that condition would not be a dismissal of the action. Section 396b, Code of Civil Procedure, as amended by St.1933, p. 1842, expressly provides that "if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, or with the justice if there be no clerk, an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court."

An exception is made to the provision just quoted; it is: "Except as otherwise provided in section 396a", Code of Civil Procedure. It is because of this that we have suggested that possibly the trial court was of the opinion that the provisions of section 396a, as amended, warranted his judgment of dismissal. In part that section reads: "In all actions and proceedings within the subject matter jurisdiction of justices' courts of Class B, whether commenced in a justices' or municipal court, plaintiff must state facts in the complaint, verified by his oath, or the oath of his attorney, or in an affidavit of the plaintiff or of his attorney filed with the complaint, from which it can be determined which court is, under the provisions of this title, the proper court for the trial of such action or proceeding. When such affidavit is filed with the complaint, a copy thereof must be served with the summons. Except as herein provided, if such complaint or affidavit be not so filed, no further proceedings shall be had in the action or proceeding, except to dismiss the same, unless defendant consents, in the manner hereinafter provided, to the keeping of the action or proceeding in the court where commenced." Later, in the second paragraph of the same section, we find: "When it appears from such complaint or affidavit of the plaintiff that the court in which such action or proceeding is commenced is a proper court for the trial thereof, all proper proceedings may be had, and the action or proceeding may be tried therein."

In the case under review the complaint was verified by the plaintiff; in it was a statement that the defendants resided in Los Angeles city. These facts, standing alone, bring the case within the second paragraph of the section, just quoted, for they reveal the trial court as a proper court for the trial thereof, although not necessarily the only proper court, and hence "all proper proceedings may be had, and the action or proceeding may be tried therein." But this is not all. As already noted, the complaint stated facts, or perhaps we should say, in view of the use of the common counts, employed a formula, from which it appeared that the obligations were contracted to be performed in Los Angeles city. From the complaint, therefore, it would be determined that the trial court was the only proper court for the trial of the action.

The fact, developed at the trial, that the allegation of the complaint was incorrect which stated that the defendants resided in the city of Los Angeles, for in truth they resided in the city of Glendale, did not authorize the dismissal, even should we disregard all other allegations and facts. Section 396a, Code of Civil Procedure, as amended, contemplates just such a possibility, for it provides further in the second paragraph, from which we have already quoted: "provided however, that in such case a motion for a transfer of the action or proceeding may be made as in other cases, within the time, upon the grounds, and in the manner provided in this title, and if upon such motion it appears that such action or proceeding is not pending in the proper court, or should for other cause be transferred, the same shall be ordered transferred as provided in this title." Respondent's remedy, if he desired to have the action transferred to the Glendale justice's court or to any other court, was to make a motion for a transfer. This he did not do; instead he moved for a dismissal. There was no theory on which the court was justified in entering a judgment of dismissal.

The judgment of dismissal is reversed; appellant to recover his costs of appeal.

SHAW, P. J., and SCHAUER, J., concur.

11 Cal.2d 147

PEOPLE v. ROSEN.

Cr. 4128.

Supreme Court of California.

April 19, 1938.

1. Robbery ⚿4

In robbery case, no felonious intent exists where the owner takes his own specific property from the possession of another, even though the taking is under such circumstances as would constitute robbery if the possessor were the owner thereof. Pen. Code, §§ 20, 211, 211a, 213.

2. Criminal law ⚿1221
Lotteries ⚿3

Games of chance such as lotteries are illegal, the winner gains no title to or right of possession of property at stake, and participants have no standing in a court of law or equity.

3. Robbery ⚿4

Recovery of money lost at gambling from winner by such force as ordinarily constitutes robbery is not "robbery" where loser is only acting in good faith to recover losses, notwithstanding that loser has no remedy at law or in equity.

[Ed. Note.—For other definitions of "Robbery," see Words & Phrases.]

4. Robbery ⚿23(1), 27(3)

In prosecution for robbery, where defendant contended that money taken by him constituted the proceeds of gambling transactions which the victim had unlawfully obtained from him, court should have admitted evidence on the question of the legality of the game at which defendant lost the money and should have given instruction requested by defendant relating thereto.

5. Robbery ⚿26

In prosecution for robbery, where defendant contended that money taken was the proceeds of gambling transactions which the victim had unlawfully won from defendant, whether victim operated an illegal game at which defendant lost his money, whether one conducting the game was the agent of the victim, whether the money taken by defendant constituted winnings from gambling transactions, and whether defendant's expressed intent to get back his own money was bona fide, were questions for the jury.

6. Criminal law ⚿829(3)

In prosecution for robbery, where defendant contended that money taken was the proceeds of gambling transactions which the victim had unlawfully won from defendant, failure to instruct on defense that it was defendant's bona fide belief that the money was his own was prejudicial error, notwithstanding instruction on necessity of the union of act and felonious intent, and that one cannot be guilty of robbery where the property taken belonged to him, even though the taking was accomplished by force or fear.

SEAWELL and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Dave Rosen was convicted of robbery in the first degree, and he appeals.

Reversed.

Prior opinion, 68 P.2d 382.

A. H. McConnell, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged by information with having committed the crime of robbery by feloniously taking from one Paul W. Whitcomb the sum of $198, accomplished by means of force and fear. The defendant was also charged with having been armed at the time with a deadly weapon. He was tried on his plea of not guilty and convicted of robbery in the first degree. He appealed from the judgment of conviction and from the order denying his motion for a new trial.

This is a case where admittedly the defendant is guilty of the crime of assault with a deadly weapon. The question is whether he had the right to have the jury pass upon his defense interposed to the charge of the crime of robbery.

It is undisputed that the defendant, at about half-past 11 o'clock on the night of December 19, 1936, took the sum of $198 from a tin box kept in the rear room of Whitcomb's clock shop in the basement of the Jergins building in Long Beach; that the defendant was then armed with a pistol; and that he accomplished his purpose by putting Whitcomb in fear. The grounds of the appeal are: (1) That the court refused to admit evidence offered in support of the defense that the taking was under a bona fide claim that the property taken belonged to the defendant and that the felonious intent necessary to complete the crime of robbery was therefore lacking; (2) that the court refused to instruct the jury upon the theory and proffered evidence of such defense; and (3) that the court failed to instruct the jury on the law applicable to the crime of assault with a deadly weapon, such a crime having been established by undisputed evidence, including the admission of the defendant.

Across the hall from Whitcomb's clock shop a place called "Miller's Tango Parlor" was in operation. During several months prior to the date of the alleged offense the defendant had frequented Miller's and during that period had lost in all about $1,000. He had played the game of "tango" at Miller's on the night in question and lost about $55. The court refused to receive the defendant's proffered testimony that the game of tango was a gambling or lottery game and illegal under the laws of this state. However, it appeared from the admitted evidence that in such a game the player purchased from the operator a number of cards at 10 cents each, the price being collected before the commencement of the game. Cash prizes were paid to the holders of winning cards. Under the method of "payoff" the holders of winning tickets were required to cash them by presenting them to Whitcomb, who deducted 4 per cent. as a discount charge. Whitcomb moved back and forth between the parlor and his shop and carried money from the former to the latter, sometimes in loose bills and at other times in a tin box. He kept a separate fund in the box at his shop from which he paid the winners. It was from that box that the defendant took the sum of $198, which was its entire cash contents.

Upon his apprehension the defendant made a statement to one of the arresting officers that he had lost all he had at Miller's; that he was merely going to get back his own money; and that he would have taken more had there been any more, because he had lost about $1,000 at Miller's over a period of six months.

[1-3] The Penal Code, § 211, defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Robbery perpetrated by being armed with a dangerous or deadly weapon is robbery in the first degree and is punishable by imprisonment in the state prison for not less than five years. Sections 211a and 213, Pen.Code. Section 20 of the Penal Code provides that in every crime or public offense there must exist a union or joint operation of act and intent. This requirement of union of intent and act has led to the uniform rule in robbery cases that there can exist no felonious intent when the owner takes his own specific property from the possession of another, even though the taking is under such circumstances as would constitute robbery if the possessor were the owner thereof. People v. Vice, 21 Cal. 344, 345; People v. Ammerman, 118 Cal. 23, 50 P. 15; 22 Cal.Jur. p. 841; Johnson v. State, 24 Okl.Cr. 326, 218 P. 179; People v. Hughes, 11 Utah 100, 39 P. 492; State v. Brill, 21 Idaho 269, 121 P. 79; Triplett v. Commonwealth, 122 Ky. 35, 91 S.W. 281; Glenn v. State, 49 Tex.Cr.R. 349, 92 S.W. 806, 13 Ann.Cas. 774, 775 and cases cited in note; Temple v. State, 86 Tex. Cr.R. 219, 215 S.W. 965; note 135 Am.St. Rep., p. 485. While there appears to be a conflict of authority on the question whether felonious intent is present when the defendant seeks the recaption of money lost by him at an illegal game (note, 135 Am.St. Rep. pp. 485–489), the weight of authority supports the conclusion that the intent to steal is lacking in such a case, for the law recognizes no title or right to possession in the winner. It is the law in this state that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity. Gridley v. Dorn, 57 Cal. 78, 40 Am.Rep. 110; Bank of Orland v. Harlan, 188 Cal. 413, 421, 206 P. 75; 16 Cal.Jur. p. 716. In jurisdictions where such is the state of the law the weight of authority appears to favor the view that the recaption by force or fear of money lost at illegal games is not robbery, although the act may be punishable as an unlawful assault or trespass. People v. Hughes, 11 Utah 100, 39 P. 492, 493; Thompson v. Commonwealth, Ky., 18 S.W. 1022; Sikes v. Commonwealth, Ky., 34 S. W. 902; Gant v. State, 115 Ga. 205, 41 S. E. 698; State v. Price, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458, and note at page 1461; notes, 57 L.R.A., p. 443; 13 Ann.Cas., p. 775; 21 Ann.Cas., p. 1139; 40 L.R.A.,N.S., pp. 805, 806. The courts recognize that in such a case, whatever other element of crime may be present, there cannot exist an intent to steal or take feloniously the prop-

erty of another, which is an essential element of the crime of robbery. In People v. Hughes, supra, it was said: "In all criminal cases the question of intent is an important one. If this element is lacking, the general rule is that no offense has been committed. This rule is not only humane, but a contrary one would be opposed to all the principles which underlie human conduct as respects the bearing of individuals towards each other, and also as regards their position towards the state. And so the law is that, when evil intent is lacking, the act or omission, which otherwise would constitute an offense, is robbed of its criminality. The rule governing this class of cases seems to be well settled and thoroughly defined. In a note in 70 Am.Dec. 188 (State v. McCune), where a number of authorities are collected, this proposition is laid down: 'When the prisoner takes the property under a bona fide impression that the property belongs to him, he commits no robbery, for there is no animus furandi.' * * * The defendant in all cases is entitled to have the law governing his case given to the jury for their guidance, and in this case the question of honest belief and bona fide intention should have been submitted to and passed upon by the jury under proper instructions."

It has been suggested that the decisions which hold that felonious intent is lacking when the accused retakes money lost at illegal gambling are based on statutory law which gives a right of action to the loser to recover the money lost. Note, 42 A.L.R. p. 742. The law of Texas and Michigan appears to be consistent with that theory. Blain v. State, 34 Tex.Cr.R. 448, 31 S.W. 369; People v. Henry, 202 Mich. 450, 168 N.W. 534. The decisions in Texas holding that the act is robbery are based on the absence of any statute giving legal redress. In Michigan it is held that such retaking does not constitute robbery because the loser is entitled to recover in an action in assumpsit or replevin. That view, however, does not necessarily form the exclusive basis upon which a charge of robbery has failed. A further basis appears to be that, where the winner obtains no valid title or right to possession of the money won (State v. Price, supra; Thompson v. Commonwealth, supra), the loser cannot have a felonious intent in taking it. The view which seems to be consistent with the declared policy in this state is that the complaining witness, being in a sense in pari delicto with the accused, should not be heard in a court of justice on a charge of robbery against one whose only purpose was to retake money lost at an illegal game. This view neither condones nor invites the commission of crime, inasmuch as the accused must pay the penalty for the violation of any applicable penal law.

It has also been held that in resisting the charge of robbery by a showing that the intention was the recaption of money lost at an illegal game, it is not incumbent upon the defendant to prove that the money reclaimed was the identical money won from him. Sikes v. Commonwealth, supra; Gant v. State, supra. However, the accused must intend in good faith to retake his own property. The question of intent is one for the jury which may find, if the facts justify it, that the defendant's expressed intent was a mere pretext resorted to as a cover for an intent to steal. Crawford v. State, 90 Ga. 701, 17 S.E. 628, 629, 35 Am.St.Rep. 242.

[4, 5] It follows that the trial court should have admitted evidence on the question of the legality of the game at which the defendant lost money, and should have given instructions requested by the defendant consistent with the views herein expressed. The jury should have been permitted to consider the question of the defendant's intent as disclosed by all the evidence, including that offered and rejected. People v. Keefer, 65 Cal. 232, 3 P. 818; State v. Brown, 104 Mo. 365, 16 S.W. 406. It was for the jury to determine whether Miller operated an illegal game at which the defendant lost sums of money; whether Whitcomb was the agent of the operator and handled the funds collected in the conduct of the game; whether the money taken by the defendant consisted of winnings from the parlor; whether the defendant's expressed intent to get back his own money was bona fide or, because of remoteness from the time of loss or for any other reason, it was merely a pretext for an act of robbery.

[6] The court did instruct the jury on the necessity of the union of act and felonious intent and in addition that "one cannot be guilty of robbery where the property taken belonged to him, even though the taking is accomplished by force or fear." But the failure to instruct further on the theory of the defense that it was the defendant's bona fide belief that the money was his own constituted prejudicial error on the record here presented.

The judgment and the order denying the motion for a new trial are and each is reversed.

SEAWELL, Justice (dissenting).

I dissent.

The law of this state shut the door against those who voluntarily stake their money on gambling with cards and games commonly known as games of chance, whatever be the form or device used by the parties who mutually engaged in gambling transactions. Courts will not act as referee as to the fairness of the methods of gaming or attempt to balance the bona fides of such unlawful ventures between parties who voluntarily stake their money or property on the hazard of chance, or as to wagers made by persons as to which one is the most skillful in the movements of the hands or other kinds of deception, whether the game is played with cards or by the manipulation of mechanical devices.

To hold that a loser gambling at games or wagering on the results of chance would be privileged to return to the gambling rooms where he had lost his stakes or recapture his losses at any place where he might meet the person he had gamed with, and, by force of arms, recoup his losses, would throw wide open the door to those criminally inclined to engage in robbery in its most dangerous form in the guise of recapturing stakes lost at some form of gambling or chance, without incurring the penalty prescribed for the offense of robbery. Such a defense could be made in every borderline case where the character of the transaction might be less marked than in the instant cases which bears some resemblance to a large number of nation-wide transactions not infrequently referred to as gambling ventures. The recognition by law of the policy contended for would have the direct effect of menacing life by encouraging violence and breaches of the peace. It would offer a tempting subterfuge behind which gunmen would find convenient, if not ample, protection. The rule would open a new field for the operations of the criminal minded. We see no legal or moral strength on the side of appellant. He voluntarily parted with the possession of his money by matching his cunning with that of another. He lost and possession passed to the winner. He had no title which the law would protect. The law has no interest in the question of title as between the parties, but it does have an interest in the preservation of the life and limb of its citizens and in the maintenance of peace and order. That is its first duty. This being so, why, particularly where the actor, by his own folly, is responsible for the situation in which he has placed himself, should the law encourage or lend its approval to the commission of breaches of the peace? If the law will not aid him in the recovery of that which he has voluntarily parted with, how can it be said that he has a legal right to rise above it and assume the role of an outlaw in recovering possession by force of arms?

The cases in which a purse is snatched from the lands of a bystander and the victim makes a recovery of his specific property, or where a thief steals an animal and recovery is made by the owner from the pasture or possession of the thief, are not comparable with the situation presented by the instant case. The distinction as to the means of possession is too apparent to require more than bare mention. In the first instance possession is gained by theft or by the exercise of fear or force. In the examples cited, the owner did not voluntarily part with possession; in the instant case, he did. This marks an important distinction in two widely different situations. Under the doctrine contended for, the loser at a game of chance, without regard to time or place, could continue his acts of prey under the sanctity of law and could appropriate unidentified moneys in which he has no title of sufficient stability to support his claim in an action at law until the last penny, with or without interest, has been made good.

There is no merit in the claim that this species of violence would have a tendency to suppress gambling. The laws which are designed to prohibit that evil, if properly enforced are sufficient for that purpose. The nostrum administered to improve an unwholesome condition would have a more deleterious effect on the body politic than the evil which is remedial upon the enforcement of laws already written into our statutes.

The holding that stakes lost at the gambling table may at any time or place thereafter be retaken at the point of arms, thereby stripping an important section of the Penal Code of its deterrent force in such cases, portends the danger that such pronouncement will tend to increase lawlessness by holding out hope of immunity to persons criminally disposed, and perchance act as an urge to others who, finding themselves driven to the brink of tragic depths by the disappointing turn of fortune, will be tempted to recoup such losses by embracing the desperate hazard of forcibly taking property from the person of another. If the loser in his attempt to take from the person whom he believes has in his possession money allegedly won from him—moneys, it may be, which are held in trust for another—and the latter resists the attempted search and seizure of his person which has all the appearances of an attempted robbery, and a homicide is thereby committed by one or the other, by no means a remote possibility, an interesting and vexatious question would arise as to the legal rights of either under the law of excusable or justifiable homicide.

In the confused situation in which the defense of person and property would be thrown by extending the rule as approved by the main opinion, it may be pertinent to ask what should be the measure or standard as to the quantum of force which either party may be entitled to exert in the struggle, first, with respect to the enforcement of the demands made by the known or disguised assailant, and, secondly, as to the resistance of an act which has every appearance of an ordinary robbery.

A voluntary participant in a game of chance has no title in or right of possession of personal property which the law recognizes after it has passed from the possession of one wagerer into the possession of the other. A creditor in legitimate business transactions is not given the privileges and immunities which the main opinion would bestow on persons who seek to recoup gambling losses.

I perceive no real reason or moral requirement for the adoption of a rule which will have the effect of throwing confusion into well-settled rights of person and property. In cases where it appears that there are mitigating circumstances which weigh in a defendant's favor, there is scarcely a doubt, under our humanized administration of the criminal law, but that the defendant would be released from a prison sentence by an order admitting him to probation, at the termination of which, if his conduct merits it, the entire proceeding is expunged from the court's records. In addition, he has a right to apply to the executive head of state government for executive clemency, which is uniformly granted in proper cases.

I am of the view that the rule contended for by appellant would prove to be inimical to the enforcement of law and the maintenance of order, and the doctrine which the main opinion approves would tend to enlarge the field of crime and incite disorder rather than restrict it.

I concur: LANGDON, J.

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11 Cal.2d 156

WESTERN LITHOGRAPH CO. v. STATE BOARD OF EQUALIZATION et al.

S. F. 15914.

Supreme Court of California.

April 19, 1938.

Rehearing Denied May 19, 1938.

1. Taxation 🔑6, 18

The immunity of state and federal governments from taxation of one by the other arises from necessity of preserving independence of dual system of government under Constitution and rests on conviction that each government must be left free from undue interference by the other, so that it may administer affairs within its own sphere.

2. Taxation 🔑6

To render federal government immune from state taxation, exercise of state's taxing authority must be such as frustrates purpose of national legislation or impairs efficiency of federal government's agencies in discharge of their duties.

3. Taxation 🔑6, 18

The limitation on powers of state and federal governments to tax each other must receive practical construction permitting each to function with minimum interference by the other and cannot be so varied or extended as seriously to impair taxing power of government imposing tax or appropriate exercise of functions of government affected thereby.

4. Taxation 🔑6, 18

The immunity of state and federal governments from taxation by the other need not be extended to subjects within general application of nondiscriminatory laws in order to preserve power to borrow money, where no direct burden is laid on governmental instrumentality and there is only remote, if any, influence on exercise of governmental functions.

5. Taxation 🔑6

A state tax is not within inhibition of tax on federal instrumentality, unless it is in fact directly on such instrumentality or its effect is so direct as to constitute it substantial, as distinguished from indirect and remote, interference with exercise of governmental functions delegated to federal instrumentalities.

6. Licenses 🔑28

The Retail Sales Tax Act imposes excise tax, measured by gross receipts from sales, on retailer, not consumer, though it provides specific method whereby retailer may calculate reimbursement of amount of tax from his customers by listing such amount separately from sales price. St. 1933, p. 2602, § 8½; St.1935, p. 1253, §§ 3, 5, pp. 1257, 1258, §§ 2(f), 9.

7. Taxation 🔑6, 18

The principle of immunity of federal and state governments from taxation by each other gives neither government inherent right to purchase goods at lower price than other consumers by subtracting amount of nondiscriminatory taxes imposed on seller by other government.

8. Taxation 🔑10

The tax, imposed on retailer under Retail Sales Tax Act on basis of return including receipts from sales of tangible personalty to national bank, is not invalid as unduly burdening federal government or interfering with exercise of governmental functions delegated to its instrumentality. St.1933, p. 2602, § 8½; St.1935, p. 1253, §§ 3, 5, pp. 1257, 1258, §§ 2(f), 9.

9. Courts 🔑91(2)

A decision of District Court of Appeal that state retail sales tax, imposed on retailer selling personalty to instrumentality of federal government, was invalid as tax on such instrumentality, is not controlling in proceeding before Supreme Court by another retailer for writ of mandamus compelling allowance and payment of claim, rejected by state board of equalization, for refund of tax paid on basis of gross amount received for tangible personalty sold to national bank, though Supreme Court denied petition for hearing and United States Supreme Court denied state attorney general's petition for writ of certiorari in former case.

In Bank.

Proceeding by the Western Lithograph Company for a writ of mandamus to compel the State Board of Equalization and others to allow and pay petitioner's claim for refund of retail sales taxes paid by petitioner.

Application for peremptory writ denied, and alternative writ discharged.

Morrison, Hohfeld, Foerster, Shuman & Clark and Louis Ferrari, all of San Francisco, and E. A. Miller, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondents.

SHENK, Justice.

Mandamus. The petitioner, Western Lithograph Company, filed with the State Board of Equalization a claim for refund of sales taxes imposed pursuant to the Retail Sales Tax Act, St.1933, p. 2599, as amended Sts.1935, pp. 1225, 1252, 1256, amounting to $356.05 and theretofore paid by it. The claim was rejected and this proceeding was brought to compel the allowance and payment of the claim.

During the first quarter of 1937 the petitioner sold tangible personal property to Bank of America National Trust & Savings Association for use in this state at a total purchase price of $11,868.33. It included in its return for said quarter the gross amount received from the sales so made and payment of the 3 per cent. computed thereon. The reason advanced by the petitioner for the allowance of the claim for refund is that the bank is an instrumentality of the United States government and is not subject to any tax by the state except in the manner prescribed by section 5219, Revised Statutes, as amended, 12 U.S. Code, § 548, 12 U.S.C.A. § 548, in conjunction with article 13, section 6, of the Constitution of California and the Bank and Corporation Franchise Tax Act, St.1929, p. 19, as amended, which do not permit the imposition on the bank of a tax such as contemplated by the Retail Sales Tax Act.

We may assume, for the purposes of this proceeding, that if the tax imposed pursuant to the provisions of the State Retail Sales Tax Act is a tax on the consumer or purchaser of the goods sold, then the petitioner is entitled to the relief sought.

It is further assumed that the bank, as a national bank, is an instrumentality of the United States, as contemplated by McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, and cases following it (see Davis v. Elmira Savings Bank, 161 U.S. 275, 16 S. Ct. 502, 40 L.Ed. 700; First National Bank v. Anderson, 269 U.S. 341, 347, 46 S.Ct. 135, 138, 70 L.Ed. 295; Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 244, 52 S.Ct. 133, 135, 76 L.Ed. 265), and as such is not subject to tax by the state except with the consent of and in the manner prescribed by congress.

[1] The immunity of the state and federal governments from taxation of the one by the other was created out of the necessity for preserving the independence of the dual system of government under our constitutional system. As stated in Metcalf & Eddy v. Mitchell, 269 U.S. 514, at page 523, 46 S.Ct. 172, 174, 70 L.Ed. 384, "Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other," citing among other cases McCulloch v. Maryland, supra.

[2] That this principle of immunity has its inherent limitations has also been recognized. Helvering v. Powers, 293 U.S. 214, 225, 55 S.Ct. 171, 173, 79 L.Ed. 291, and cases cited. The decision in Davis v. Elmira Savings Bank, supra, 161 U.S. 275, at page 283, 16 S.Ct. 502, 503, 40 L.Ed. 700, indicated that the exercise of authority sought to be condemned or avoided must be one which "either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created." And in Helvering v. Powers, supra, 293 U. S. 214, at pages 224, 225, 55 S.Ct. 171, 173, 79 L.Ed. 291, it was said: "But whether that field of activity, in relation to a state, carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. * * * The principle of immunity thus has inherent limitations."

[3] It was also said in Metcalf & Eddy v. Mitchell, supra, following the previous quotation herein from that case: "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it."

It was held in that case that a federal tax on the income of consulting engineers, earned in part under contracts to furnish professional services to certain states and municipalities, was not such an interference. The court said, 269 U.S. 514, at page 524, 46 S.Ct. 172, 175, 70 L.Ed. 384: "But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way." (Citing cases.)

[4] The following language in the case of Willcuts v. Bunn, 282 U.S. 216, at page

225, 51 S.Ct. 125, 127, 75 L.Ed. 304, 71 A.L.R. 1260, is also illustrative of the limitations of the principle: "The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government." Thus in Liggett & Myers Tobacco Co. v. United States, 299 U.S. 383, 57 S.Ct. 239, 81 L.Ed. 294, it was held that a federal tax imposed on the manufacture of tobacco, although the duty of payment was postponed until removal or sale, created no direct burden upon the state, but that its effect was incidental, indirect, and permissible within the doctrine approved by the cases cited by the court.

Having in mind the foregoing principle and its general limitations, we proceed to examine the provisions of the Retail Sales Tax Act. Section 3 of the act, as amended, St.1935, pp. 1252, 1253, provides: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent * * * on and after July 1, 1935." The term "gross receipts" is defined, section 2 (f), as amended, St.1935, p. 1257, as the total amount of the sale price, with other inclusions not pertinent here; but also that "for the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailer shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer."

Section 8½, St.1933, pp. 2599, 2602, reads: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein."

Section 9, as amended, St.1935, p. 1258, in its pertinent parts provides: "The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable quarterly. * * * The board may by regulation provide that the amount collected by the retailer from the consumer, in reimbursement of taxes imposed by this act, shall be displayed separately from the list, advertised in the premises, marked [market] or other price on the sales check or other proof of sale."

Section 5, as amended, St.1935, p. 1253, specifically exempts from the provisions of the act and from the computation of tax levied, assessed or payable, "the gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

[5] The petitioner places reliance on the last-quoted provision as authority or direction that the gross receipts from sales of tangible personal property to instrumentalities of the federal government are not to be included in the quarterly returns made by the taxpayer. This is true only if otherwise the tax must be deemed to be imposed on the federal instrumentality within the inhibition of the principle under consideration. It is not within the prescribed inhibition unless it is in fact a tax directly upon the government instrumentality, or, if not, its effect is nevertheless so direct as to constitute it a substantial as distinguished from an indirect and remote interference with the exercise of the governmental functions delegated to the federal instrumentalities.

[6] The provisions of the act itself specifically are that the tax is laid upon and is a direct obligation of the retailer. Although the act furnishes the method by which the retailer may calculate reimbursement to himself by listing separately the amount of the tax from the sales price, nevertheless section 8½ and other provisions of the act specially negative any intent of the Legislature that the tax should

be considered as a tax on the consumer. In every case in which that question has arisen under the California Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer. Yosemite Park & Curry Company v. Johnson, Cal.Sup., 76 P.2d 1191; M. G. West Company v. Johnson, 20 Cal.App.2d 95, 66 P.2d 1211; Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 736, 57 P.2d 1022; Graham Bros., Inc., v. Los Angeles, 6 Cal.App.2d 203, 44 P.2d 452; People v. Herbert's of Los Angeles, Inc., 3 Cal.App.2d 482, 39 P.2d 829, 830; Meyer Construction Co. v. Corbett, D.C., 7 F. Supp. 616. Where the same question has arisen with reference to the administration and effect of similar provisions in the Motor Vehicle Fuel License Tax Act, St. 1923, p. 571, as amended, the same answer has uniformly been given. Standard Oil Co. of California v. Johnson, Cal.Sup., 76 P.2d 1184; People v. Ventura Refining Co., 204 Cal. 286, 294, 268 P. 347, 283 P. 60; Rio Grande Oil Co. v. Los Angeles, 6 Cal. App.2d 200, 44 P.2d 451.

The law contemplates the imposing of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; and the provision for a bookkeeping method to compute the amount of the tax separately from the sales price does not alter this fact. Roth Drug, Inc., v. Johnson, supra, 13 Cal.App.2d 720, at page 738, 57 P.2d 1022. "That in ultimate effect the fund out of which payment [of the tax] is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer." People v. Herbert's of Los Angeles, Inc., supra.

As noted in Meyer Construction Co. v. Corbett, supra, the act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer. Therefore when the question has been whether the tax is collectible on receipts from sales to municipalities within the state for use in governmental functions it has been held that the retailer must pay the tax. Rio Grande Oil Co. v. Los Angeles, supra; Graham Brothers v. Los Angeles, supra.

In large part the controversy has resulted from the inclusion in the act of a specific method by which the retailer may calculate reimbursement of the tax from his customers. Had no such provision been made, but the tax had been imposed on the retailer at the specified rate on gross receipts from sales without more, the question would probably not have arisen, and the tax would have been considered a tax to be absorbed by the retailer and rejected in the higher prices of the commodities, just as any tax on property or business. In incorporating such provisions, however, the Legislature plainly indicated its intent nevertheless to lay the tax solely on the retailer and to create the tax relationship between the latter only and the state. Furthermore, the provisions of the act, as indicated by the language quoted from section 2 (f), were undoubtedly designed to avoid the result in the case of Lash's Products Co. v. United States, 278 U. S. 175, 49 S.Ct. 100, 73 L.Ed. 251. There the act imposing 10 per cent. tax did not include a provision for separation of the price and tax, although the regulations and practice of the commission permitted it. The taxpayer contended that where the practice was not followed but nevertheless the sales price contained the amount of the tax he was liable only for the tax computed by first deducting the 10 per cent. from the sales price. The court expressed a doubt of the propriety of the commission's practice under the provisions of the act, but held that in any event the taxpayer before the court must take the act as he found it and that his tax must be computed on the total amount actually received. The suggestion contained in the court's statement, however, is obvious, namely: "Naturally a delicate treatment of a tax on sales might seek to avoid adding a tax on the amount of the tax." The effect of the provisions of the California Retail Sales Tax Act is to afford the opportunity for that treatment and nothing more. The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the retailer of a tax on the amount of the tax. Under such provisions the effect stated in the case last cited still obtains, namely, that "the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all," and "the amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price." The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.

[7] Unquestionably the act is nondiscriminatory. It operates upon all alike in the same class, and does not result in exacting more from the federal instrumentality than is paid by other individuals. To conclude that the bank may come into the open market and purchase goods at a price less than other buyers merely by insisting that the amount of a nondiscriminatory tax imposed upon sellers should first be deducted therefrom, is to accord to federal instrumentalities some favor or grace which is not necessarily within the contemplation of the principle of immunity here asserted. It cannot be said that the principle embraces the inherent right in either government to come into the open market and purchase goods at a lower price than paid by other consumers by clipping therefrom the equivalent of nondiscriminatory taxes validly imposed on the seller by the other government, and consequently reduce that government's revenues to a proportionate extent. This view is in harmony with the cases hereinabove cited which recognize and define the inherent limitations of the doctrine of immunity, and follows the pronouncements of the Supreme Court of the United States in its more recent decisions formulating its conclusions on the applicability of the principle and its limitations in relation to other taxing statutes. James v. Dravo Contracting Co., 302 U. S. 134, 58 S.Ct. 208, 211, 82 L.Ed. —, 114 A.L.R. 318, followed in Silas Mason Co., Inc., v. Tax Commission of Washington, 302 U. S. 186, 58 S.Ct. 233, 82 L.Ed. —, and Atkinson v. State Tax Commission of Oregon, 58 S.Ct. 419, 82 L.Ed. —, Jan. 31, 1938.

We are aware that statements which might be said to support a contrary conclusion have been made in the cases of Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857, 56 A.L.R. 583, Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S.Ct. 601, 75 L.Ed. 1277, and Graves v. Texas Co., 298 U. S. 393, 56 S.Ct. 818, 80 L.Ed. 1236. Those cases involved, respectively, a law of Mississippi imposing an excise tax of one cent per gallon upon the sale of gasoline, a statute of Massachusetts levying an excise tax on sales and a gasoline tax act of Alabama.

[8] In the case of James v. Dravo Contracting Company, supra, the court had before it for consideration the Gross Sales and Income Tax Law of West Virginia, Code W.Va. 1931, 11-13-1 et seq., as amended Acts 1933, 1st Ex.Sess., c. 33, which provided for annual privilege taxes on account of "business and other activities." That law imposed upon the contracting company a tax equal to 2 per cent. of the gross income from its business. The imposition of the tax on income derived from a contract with the federal government, executed to further the construction of certain dams, raised the question whether the tax laid a direct burden upon the federal government. The holding was that the tax was not one on the government, its property, or officers, nor was it upon an instrumentality of the government, or upon the contract. The court reiterated and redefined the limitations of the principle of immunity as stated in its former decisions. Although it said, "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system," it applied, as compelling a conclusion that the tax was valid, the limitation on the principle of immunity stated in Willcuts v. Bunn, supra, and hereinabove quoted. In the Dravo Case the court also said: "But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work." The court concluded that the tax provided by the West Virginia statute did not interfere in any substantial way with the performance of federal functions, and was a valid exaction. It expressly declined to

consider whether the same result would follow from the application of the principles stated if commodities or goods were furnished rather than services. It refused expressly to overrule the cases of Panhandle Oil Co. v. Mississippi ex rel. Knox, Indian Motocycle Co. v. United States, and Graves v. Texas Co., supra, but noted that in those cases the taxes were held to be invalid because laid on the sales to the respective governments, and further that theretofore those cases had been distinguished and must be deemed limited to their particular facts. Notwithstanding the holdings or expressions in the cases distinguished, it must here be concluded that a proper construction of the Retail Sales Tax Act of California is that the tax is not on the sale, but rather that it is a tax in the same category as property and excise taxes payable by an independent contractor engaged in the business of retail sales which, although they are reflected in the higher cost of the product or commodity offered, must be considered merely as a necessary expense of conducting the business. It is a tax computed on the gross receipts from the conduct of the business of the retail merchant. Essentially, as intimated in Metcalf & Eddy v. Mitchell, supra, there does not appear to be any sound basis for a distinction because the receipts affording the measure of the tax are derived from the retail business conducted by an independent contractor or merchant, rather than from the sale of services, where otherwise the imposition is nondiscriminatory. Clearly the imposition of a privilege tax on the retailer of commodities does not interfere with the power of the government to borrow money; nor does it affect in any substantial manner the efficiency of its agency in the performance of its duties, nor the ability of the persons taxed to discharge their contractual obligations to the government, nor the ability of the government to procure the services of private individuals to aid them in their undertakings.

Following the path pointed by the court in the Dravo Case, we conclude that the tax on the retailer under the Retail Sales Tax Act of this state imposed on the basis of a return which includes receipts derived from sales of tangible personal property to the bank, a federal instrumentality, does not unduly burden the federal government nor interfere with the exercise of the governmental functions delegated to its instrumentality, and was therefore validly imposed.

[9] The petitioner relies with much confidence on the decision of the District Court of Appeal in M. G. West Company v. Johnson, supra, decided in April, 1937, wherein it was held, among other things, that the tax imposed on the petitioner therein under similar facts was in substance a tax on the government instrumentality and as such was prohibited not only by the federal statute under which those agencies were incorporated but also by the doctrine of McCulloch v. Maryland, supra. It is true that a petition in the West Company Case for a hearing in this court was denied. It also appears that the petition of the Attorney General for a writ of certiorari in the Supreme Court of the United States was denied on October 11, 1937, 58 S.Ct. 45, 82 L.Ed. —, and that subsequent to the decision of the Supreme Court in the case of James v. Dravo Contracting Co., supra, a petition for a rehearing in that court of its denial of a petition for certiorari in the West Company Case was filed by the attorney and denied on February 7, 1938, 58 S.Ct. 525, 82 L.Ed. —. It is likewise true that the denial of the petition for a hearing in this court after decision by the District Court of Appeal in the West Company Case was not "an affirmative approval by this court of the propositions of law laid down in such opinion." People v. Davis, 147 Cal. 346, 350, 81 P. 718, 720. Nor does the denial of the writ of certiorari in the West Company Case by the Supreme Court of the United States require this court to follow the reasoning and conclusions of the District Court of Appeal. It is not to be supposed that the United States Supreme Court would recognize any necessity to assume jurisdiction of a controversy involving the validity of a state taxing statute which had been construed adversely to the state's contentions in the state court. A thorough consideration of the questions involved in the case at bar has convinced us that the decision of the District Court of Appeal in the West Company Case should not in anywise be deemed controlling in this proceeding. Application for a peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C.J; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.; HAUSER, J.; EDMONDS, J.

11 Cal.2d 776

WESTERN LITHOGRAPH CO. v. STATE BOARD OF EQUALIZATION et al.

S. F. 15915.

Supreme Court of California.

April 19, 1938.

Rehearing Denied May 19, 1938.

Taxation 🔑6

A retailer was not entitled to refund of sales taxes paid on account of sales of tangible personalty to state bank, which was member of Federal Reserve System, on ground that such bank was instrumentality of federal government. St.1933, p. 2599, as amended.

In Bank.

Proceeding by the Western Lithograph Company against the State Board of Equalization and others for a writ of mandamus to compel refund of taxes paid pursuant to the Retail Sales Tax Act.

Petition for peremptory writ denied, and alternative writ discharged.

Morrison, Hohfeld, Foerster, Shuman & Clark and Louis Ferrari, all of San Francisco, and E. A. Miller, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondents.

PER CURIAM.

The petitioner applied for a writ of mandate to compel the refund to it of taxes amounting to $269.24 paid pursuant to the provisions of the Retail Sales Tax Act of California, St.1933, p. 2599, as amended.

The facts herein are similar to those stated in the opinion this day filed in the case of Western Lithograph Company v. State Board of Equalization, Cal.Sup., 78 P.2d 731, with the exception that the bank to which the tangible personal property was sold was the California Bank, a state bank which is a member of the Federal Reserve System. It is claimed that as such member the California Bank is an instrumentality of the federal government, and the same contentions in support of the claim for refund are made here as were made in the foregoing case this day decided. All of the contentions made herein are controlled by the decision in that case. On the authority of that case, the petition for the peremptory writ is denied, and the alternative writ is discharged.

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11 Cal.2d 777

WESTERN LITHOGRAPH CO. v. STATE BOARD OF EQUALIZATION et al.

S. F. 15916.

Supreme Court of California.

April 19, 1938.

Rehearing Denied May 19, 1938.

Taxation 🔑6

The imposition of state sales tax on retailer of tangible personalty, sold to state bank, is not invalid as resulting in taxation of bank, contrary to State Constitution and laws, as such tax is imposed only on retailer, not consumer. St.1933, p. 2599, as amended.

In Bank.

Proceeding by the Western Lithograph Company against the State Board of Equalization and others for a writ of mandamus to compel a refund of taxes paid by petitioner under the Retail Sales Tax Act.

Petition for peremptory writ denied, and alternative writ discharged.

Morrison, Hohfeld, Foerster, Shuman & Clark and Louis Ferrari, all of San Francisco, and E. A. Miller, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondents.

PER CURIAM.

In this case the petitioner sought a writ of mandate to compel a refund to it of $558 paid under the Retail Sales Tax Act of California, St.1933, p. 2599, as amended. Tangible personal property was sold by the petitioner to the Hollywood State Bank. The facts therefore are similar to the facts involved in the case of Western Lithograph Company v. State Board of Equalization, Cal.Sup., 78 P.2d 731, this day decided, with the exception that the Hollywood State Bank is neither a national bank nor a member of the Federal Reserve System, and is therefore concededly not a federal instrumentality. Nevertheless the contention is here made that the imposition of the tax on the retailer under the provisions of the act results in a taxation of the bank contrary to the Constitution and laws of this state limiting and prescribing the extent to which and the methods by which state banks may be taxed. The answer to that question and related questions is contained in the opinion this day filed in the foregoing case, wherein it is held that the tax is imposed only on the retailer and not on the consumer. That holding is controlling herein and requires the same order as made in that case. The petition for a peremptory writ is therefore denied, and the alternative writ is discharged.

26 Cal.App.2d 46

DUNCAN et al. v. CORDER & SON et al.

DUNCAN v. SAME.

Civ. 11720, 11721.

District Court of Appeal, Second District, Division 2, California.

April 19, 1938.

Rehearing Denied May 12, 1938.

Hearing Denied by Supreme Court June 16, 1938.

Automobiles 🔑246(11)

Refusing instruction that if truck driver drove with ordinary care and there was no circumstance sufficient to warn person of ordinary prudence to the contrary, then he could presume that plaintiff motorist would not turn from right-hand traffic lane into center lane until plaintiff had first exercised ordinary care to see that she could do so in safety, was error especially in view of given instruction that plaintiff had right to assume that all other persons using the highway used ordinary care and caution.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Two separate actions by Martha M. Duncan and others and by Martha M. Duncan against J. H. Corder & Son, a copartnership, and others, for injuries sustained when an automobile which plaintiff was driving was forced off the road by defendants' truck. Judgments for plaintiffs, and defendants appeal.

Reversed.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

Parker & Stanbury, Harry D. Parker, and Raymond G. Stanbury, all of Los Angeles, for appellants.

Joseph Anderson, William M. Anderson, and R. E. Parsons, all of Los Angeles, for respondents.

WOOD, Justice.

The above-entitled actions were tried together and the jury returned verdicts in favor of the plaintiffs in both actions. Defendants have appealed from the resulting judgments.

Plaintiff Martha M. Duncan was on August 3, 1935, driving a Dodge automobile on the highway known as the Ridge route. The accident in question occurred about 12 miles north of Castaic at a point where the highway is divided into three lanes, the center lane being set aside for passing only. Defendant Hawkins was driving a truck owned by defendants Corder & Son. The truck overtook the automobile and in passing it some part of the truck came in contact with the automobile with the result that the automobile was forced over the side of the road and down an embankment. Mrs. Duncan received serious injuries and her husband and a passenger riding with them were killed. The actions have been tried twice. At the first trial verdicts were returned in favor of defendants and upon appeal the judgments were reversed on account of errors of the trial court in instructing the jury. A detailed statement of the facts concerning the accident may be found in the opinion on the former appeal. Duncan v. Corder & Son, 18 Cal.App.2d 77, 62 P.2d 1387.

Defendant Hawkins admitted that the horn on his truck was out of order. He claims that the horn became useless somewhere on the Castaic grade, and that under the provisions of section 93½ of the California Vehicle Act, St.1931, p. 2115, as then in force, he was justified in proceeding to his home in Tulare without the use of the horn. There is a sharp conflict in the testimony as to the exact location on the highway of the accident. Mrs. Duncan testified that she remained at all times in the right traffic lane but Mr. Hawkins testified that she swerved from the right traffic lane on to the center traffic lane as he was in the act of passing her. Each party claims that the other was negligent.

Defendants contend that the court erred in refusing to give to the jury their instructions Nos. 9, 27, 31, and 35. These instructions are of similar import and No. 9 may be given as an example: "You are instructed that if the defendant, Mr. Hawkins, was proceeding with ordinary care so far as any proximate cause of the accident was concerned, and if there were no circumstances sufficient to warn a person of ordinary prudence in his position to the contrary, then he was entitled to presume that the automobile driven by the plaintiff, Mrs. Duncan, would not be turned from the right-hand traffic lane into the center traffic lane until the driver thereof, Mrs. Duncan, had first exercised ordinary care to see that such movement could be made in safety and under such circumstances, it would not be negligence for the defendant, Mr. Hawkins, to rely and act upon such presumption." Plaintiffs answer this contention with the assertion that the instructions in question were erroneous for the reason that they have the effect to telling the jury that Mrs. Duncan did in fact drive into the center lane whereas her testimony was that she did not do so. Plaintiffs cite Scandalis v. Jenny, 132 Cal.App. 307, 314, 22 P.2d 545, 548, wherein the giving of the following instruction was held to be reversible error: "Even if you find that defendant was not using usual and ordinary care, and was therefore negligent, yet if you find from all the evidence in the case that the plaintiff immediately preceding the accident which resulted in the injuries to him, was walking or standing on the westerly side of Shasta street, and that while he was so walking or standing, said plaintiff suddenly and without warning ran into and collided with the automobile of the defendant, whose automobile at said time was on the easterly side of Shasta street proceeding northerly; and if you further find from the evidence that the said plaintiff in so acting, failed to exercise that degree of care which a child of his maturity and capacity, under similar circumstances, ordinarily exercises for his own protection, and that in so acting he contributed proximately to the accident which resulted in plaintiff's injuries, then and in that event the plaintiff cannot recover, and your verdict must be in favor of defendant." The court pointed out that the question as to which side of the street the automobile was on was taken from the jury. The instructions under attack in the present case are very different from the instruction in the case just referred to. In that case defendant's automobile was referred to by the court as standing on the easterly side of the street. In the instructions now under consideration the court was not asked to instruct the jury that Mrs. Duncan did in fact drive her automobile away from the right-hand traffic lane. Under the proffered instructions that question was to be left for the determination of the jury upon conflicting evidence.

The error in refusing to give the instructions just discussed was made more prejudicial by the fact that the court gave to the jury plaintiff's instruction No. 23 as follows: "I instruct you that the plaintiff, Martha M. Duncan, if lawfully upon the public highway, had the right to assume that all other persons using the highway would also use ordinary care and caution. This rule allows her to assume until the contrary reasonably appears, that the drivers of all other vehicles would obey and abide by the traffic laws and regulations, and that they would use due care and vigilance to avoid inflicting injury to her." This instruction is attacked by defendants, who claim that it is not a correct statement of the law. The instruction could doubtless be improved upon and, without deciding whether the court's action in reading it to the jury would call for a reversal of the judgments, it is sufficient to point out that the principle of law therein involved was presented to the jury in behalf of plaintiffs but the same principle was not presented to the jury when requested by defendants.

The judgments are reversed.

We concur: CRAIL, P. J.; McCOMB, J.

BRUCE v. SIBECK et al.

Civ. 5944.

District Court of Appeal, Third District, California.

April 13, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Fish ⊂⇒16

Rowboats, outboard motor, oars, coats, and motor tools used in connection with catching fish with an 855-foot set line, were "devices" or "apparatus" "designed" to be and capable of being used to take fish which were subject to forfeiture when used in an illegal operation of set line, notwithstanding that such property was not designed and manufactured for catching fish with a set line; the intent of the manufacturer being immaterial. St.1933, p. 470, § 842; p. 509, § 1414.

> "Designed" means intended, adapted, or designated, and may be employed as indicating a bad purpose with evil intent; the word "apparatus" is a generic word of the most comprehensive significance which may mean implements and an equipment of things provided, and adapted as a means to some end.
>
> [Ed. Note.—For other definitions of "Apparatus," "Designed" and "Device," see Words & Phrases.]

2. Fish ⊂⇒16

Officers in whose presence arrestees were illegally engaged in fishing with set line had duty to arrest such persons and take possession of property being used in commission of the offense and see that it was safely cared for until the time of trial as against contention that arrest and seizure of property was unlawful. St.1933, p. 470, § 842; p. 509, § 1414; Pen.Code, § 836, subd. 1.

3. Searches and seizures ⊂⇒7(1)

The statutory immunity from unreasonable searches and seizures relates only to such as are unreasonable in the light of common-law tradition.

4. Arrest ⊂⇒71

A seizure of property found on a person under lawful arrest is not limited to things subject to be taken under search warrant when there is no arrest of the possessor.

5. Arrest ⊂⇒71

Search of an arrested person is unlawful only when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation.

6. Criminal law ⊂⇒393(2)

The constitutional protection against self-incrimination does not prevent the use in evidence of articles taken from one under lawful arrest.

7. Fish ⊂⇒16

Officers who arrested persons engaged in their presence in illegally operating set line had duty to take possession of boats in possession of such persons for safekeeping to prevent escape and loss of boats not only to persons arrested but to the right of the state to forfeiture thereof. St.1933, p. 470, § 842; p. 509, § 1414; Pen.Code, § 836, subd. 1.

8. Appeal and error ⊂⇒846(5)

In replevin action for property seized by game wardens while being used in illegal operation of set line, reviewing court had no basis on which to enter judgment in relation to gun which was part of property seized where trial court made no finding as to use of gun or as to its value. St.1933, p. 470, § 842; p. 509, § 1414; Pen.Code, § 836, subd. 1.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Replevin action by Holmes Bruce against Charles Sibeck and others to recover personalty seized by the defendants as game wardens. Judgment for plaintiff, and defendants appeal.

Reversed.

Hearing denied by Supreme Court; SHENK and HOUSER, JJ., dissenting.

U. S. Webb, Atty. Gen., and Ralph O. Marron and Emery F. Mitchell, Deputy Attys. Gen., for appellants.

W. H. Hazell, of Lakeport, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

By this action the plaintiff sought by way of replevin to recover the possession of certain personal property which was seized by the defendants as game wardens of the state of California. The property in question was seized while the plaintiff was illegally operating a set line in violation of section 842 of the Fish and Game Code, St.1933, p. 470. The seizure was made at the time of the arrest of the plaintiff for violation of said section of the Fish and Game Code, by reason of his fishing in Clear Lake with a set line

855 feet in length. The property seized included: One Johnson outboard motor, model K–35, serial No. 56260. One rowboat 16 feet long, 4 feet 6–inch beam, 18 inches deep. One rowboat 13 feet long, 3 feet 2–inch beam, 14 inches deep. Two sets boat oars. One box motor tools. One shotgun. One slicker raincoat. One leather coat. Fishing tackle box and contents.

The record shows that Holmes Bruce, the plaintiff in this action, was arrested and charged in the justice's court in and for township No. 3, Lake county, with violation of section 842, supra, and that upon his trial he was found guilty.

From the evidence adduced the court determined that the personal property was designed to be, and was capable of being used to take fish, and was used at the time of the arrest in the commission of the offense charged.

It appears that the trial court, upon the authority of the case of Santos v. Dondero, 11 Cal.App.2d 720, 54 P.2d 764, held that the act or event giving rise to the forfeiture must be judicially determined before the property could be seized, and that it must appear that the property in question was manufactured for the sole purpose of illegally catching catfish with a set line.

By not limiting the language of the Santos Case, supra, to the facts therein involved, it would appear that the trial court has been led into error. The facts of the present case are as follows:

On December 20, 1935, while the defendants were patrolling the waters of Clear Lake, they saw the plaintiff, Holmes Bruce, and one Albert See in small boats in the vicinity of Mt. Konocti. As the wardens approached they observed that Bruce and See were fishing with set lines. When Bruce and See observed the game wardens approaching, the set line was dropped overboard and allowed to sink to the bottom of the lake. Being unable to start the motor, they rowed away from the spot where they had been fishing. The game wardens, using a drag, located the set line at the spot where the plaintiffs had been fishing and found the set line to be 855 feet long. Half of the set line had been worked over, that is, the fish had been removed and the hooks rebaited. The other half of the line still had fish upon the hooks. After the set line was located Bruce and See were placed under arrest, and as soon as it could be ascertained in what township on Clear Lake the offense was committed, they were charged with the violation of section 842, supra. The two boats, together with the equipment used by Bruce and See, were towed to Peterson's Boat Shop at Nice. Thereafter, on February 5, 1936, Bruce and See were duly convicted in the justice's court, of the crime charged, and an order was made by the justice's court forfeiting the devices and apparatus used in the commission of the offense, to the fish and game commission pursuant to the provisions of section 1414 of the Fish and Game Code, St.1933, p. 509. Section 1414 of the Fish and Game Code reads as follows: "The judge or justice before whom any person is tried for a violation of any provision of this code may, in his discretion, upon the conviction of the accused, order the forfeiture of any device or apparatus designed to be, and capable of being used, to take birds, mammals or fish, and which was used in committing the offense charged. Any device or apparatus so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State treasury to the credit of the fish and game preservation fund."

Upon the trial of the action before us the plaintiff had judgment for the return of the property, or the value thereof, and damages for its detention. The court, after finding that the property was not taken for any tax, assessment, or fine, made two findings, as follows:

"IV. The court finds that on said 20th day of December, 1935, the plaintiff, Holmes Bruce, was not using said personal property for the purpose of pursuing, taking or transporting fish or game in violation of the provisons of the Fish and Game Code of the State of California.

"V. The court finds that said boat oars, outboard motor, rowboats, coats, motor tools, and shotgun so taken from said plaintiff Holmes Bruce, by said defendants on said 20th day of December, 1935, were not designed and not manufactured for catching fish with a set line, or for the purposes of violating the provisions of the Fish and Game Code of the State of California."

These findings are to the effect that the plaintiff was not using said personal property for the purpose of pursuing, taking or transporting fish in violation of the Fish and Game Code of the State of California, and that the property seized by the defendants was not designed nor manufactured for catching fish with a set line, etc., and upon these findings judgment went for the plaintiff as herein stated.

In addition to what we have said as to the facts, it appears that the boats in question had a quantity of fish that had apparently been removed from a set line. The boats were equipped with rollers, an equipment apparently useful or necessary in operating the set line.

No attempt was made by the defendants in this action to dispose of the property seized, but possession was taken thereof for the purpose of using the same as evidence upon the trial, and also for safekeeping until the trial of the plaintiff and his then codefendant, See, could be had for the alleged illegal fishing.

[1] Upon a careful consideration of the language found in section 1414, supra, we are convinced that the construction placed thereon by finding No. V of the trial court is erroneous. The court finds, as set forth herein, that the property was not designed and not manfactured for catching fish with a set line, or for the purpose of violating the provisions of the Fish and Game Code of the state of California.

We think it is clear that the intent of the manufacturer of the two boats in question had nothing whatever to do with the crime of illegal fishing for which Bruce and See were arrested and subsequently convicted. There is a distinct difference between the meaning of the word "design" and the word "designed," the word used in the section of the Code. In 18 C.J. p. 971, the word "designed" is defined as follows: "Intended; adapted; designated. The term may also be employed as indicating a bad purpose with evil intent."

Had the Legislature intended that the bad motive should be carried back to the manufacturer, then the evil intent would likewise have to be carried back to the manufacturer of the 855-foot net before it would be lawful either to seize or forfeit the same, even though found employed in a criminal pursuit.

It necessarily follows that any language in the Santos Case, supra, which would imply or give rise to an inference that an evil intent must be carried back to the manufacturer, must be limited to the particular facts disclosed in the Santos Case, and can be given no application here, where all of the instrumentalities found in the possession of the plaintiff at the time of his arrest were not only adapted to the uses and purposes for which they were being applied, but also absolutely necessary in order to accomplish the criminal purposes in which the plaintiff was engaged.

The statute also uses the words "device" and "apparatus." In 3 C.J. p. 252, the word "apparatus" is defined as follows: "a generic word of the most comprehensive significance; implements; an equipment of things provided and adapted as a means to some end."

It requires no argument to lead to the conclusion that the boat's oars and rollers constituted equipment not only adapted to, but absolutely necessary in the use offshore of the 855–foot net. The entire equipment was a necessary part and parcel carrying out the scheme of unlawfully catching fish. We may here add that a considerable portion of the catch was found in the two boats, part of the catch in one boat and part of the catch in the other.

Outside of the gun, of which no finding is made by the court, and of its unlawful use, nothing appears in the testimony. The entire equipment was a part and parcel, and a necessary part and parcel, in order that the plaintiff and his codefendant, See, might accomplish the taking of fish unlawfully.

[2] Contrary to the findings and conclusion of the court, we think that neither the arrest nor the seizing of the property to which we have referred was unlawful. The plaintiff and his associate, See, were engaged in the commission of a criminal offense within the sight and presence of the defendants' peace officers. It was their duty then and there to arrest the plaintiff and his associate, See, and to take possession of the property being used in the commission of the offense, and see that it was safely cared for until the time of the trial, and the record discloses that this is just what the defendants in this case did.

Section 836 of the Penal Code, so far as pertinent here, reads as follows: "A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence."

As supporting the contention of the plaintiff that his arrest was unwarranted, our attention is called to the case of Silva et al. v. MacAuley et al., 135 Cal.App. 249, 26 P.2d 887, 27 P.2d 791. The facts of that case are readily distinguishable from the facts involved in the case at bar. In the MacAuley Case it appears that the plaintiffs were engaged in transporting crabs from Oregon to San Francisco. The statute or the Code provisions under which the plaintiffs in that case were arrested, the crabs, and the truck in which the crabs were being transported, seized, and confiscated, were held not to apply. The Code provisions simply prevented from taking crabs from one district in California and transporting the same through other districts. The crabs in question were not taken from any proscribed district in the state of California, but were simply being transported through the state of California from a point in Oregon to the city of San Francisco.

The foregoing statement shows that the case relied upon by the respondent to establish the illegality of the arrest is entirely dissimilar to the facts here being considered, which show that the plaintiff was arrested and the properties seized while he was in the commission of a misdemeanor in the presence of the arresting officers.

[3-6] That the arrest of Bruce and See was legal, and the taking possession of all of the equipment which was used in the carrying out of their illegal enterprise, we need only to cite the case of People of the State of New York v. Nick Chiagles, 227 N.Y. 193, 142 N.E. 583, 32 A.L.R. 676, and the annotations appended to the case as reported in A.L.R. The opinion in the case just referred to was written by Mr. Justice Cardoza, now a member of the Supreme Court, of the United States. The syllabus clearly defines the right of arresting officers to seize property used in the commission of the offense for which the defendant is arrested. It is there held that the statutory immunity from unreasonable searches and seizures relates only to such as are unreasonable in the light of common-law traditions. A seizure of property found upon one under lawful arrest is not limited to things subject to be taken under a search warrant when there is no arrest of the possessor. Search of the person is unlawful only when the seizure of a body is a trespass, and the purpose of the search is to discover grounds as yet unknown, for arrest or accusation. Constitutional protection against self-incrimination does not prevent the use in evidence of articles taken from one under lawful arrest. In the New York case the property seized consisted of certain letters.

The annotations found to the New York case in A.L.R., supra, begins with the general statement, as follows: "The right, without a search warrant to search the person of one lawfully arrested, and to seize articles found on him, or in his custody, such as weapons, evidence of crime charged, etc., is well established."

In United States v. Mills, C.C., 185 F. 318, 319; Wise v. Mills, 220 U.S. 549, 31 S.Ct. 597, 55 L.Ed. 579, we find the following language: "From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A blood-stained knife or garment, a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure."

The case of Tamplin v. Beach, 49 Colo. 516, 113 P. 513, 37 L.R.A.,N.S., 873, is authority for the proposition that an officer who lawfully arrests an offender without a warrant may search for and seize and take into his custody the subject of the crime, or the thing or instrument by which it was committed, or which might aid the prisoner in escaping, but he has no authority to search for and take from the prisoner any other property.

A number of other cases are cited in the notes to which we have referred, but what we have said illustrates the general principle as to the right of arresting officers to take possession of the instrumentalities with which the crime is then and there being committed, and is well supported. A reference to the notes is sufficient without lengthening this opinion by mentioning the different cases cited.

[7] The boats taken possession of by the defendants in this case were so taken possession of for safekeeping, and were instrumentalities by which the plaintiff and his associate, See, might have used in effecting an escape. Furthermore, in ar-

resting the plaintiff and his associate, See, it was absolutely necessary to take possession of all the instrumentalities used in the commission of the crime, including the two boats, else the same would have been left to drift aimlessly upon the waters of Clear lake, and thus lost, not only to the plaintiff in this case, but the right of the People of the State of California to have the same forfeited and turned over to the fish and game commission.

[8] The court made no finding as to the use of the gun, or as to its value. Hence, we have no basis upon which to enter any judgment in relation thereto.

From what we have set forth herein, it is evident that the judgment of the trial court should be reversed, and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

26 Cal.App.2d 55

WALLACE v. MILLER.

Civ. 1866.

District Court of Appeal, Fourth District, California.

April 19, 1938.

Hearing Denied by Supreme Court June 17, 1938.

1. New trial 🔑70

A trial judge is given a wide discretion in granting a new trial on the ground of insufficiency of evidence to justify verdict and judgment entered thereon.

2. Appeal and error 🔑1015(2)

An appellate court will not reverse an order granting a new trial on the ground of insufficiency of evidence to justify verdict and judgment entered thereon, where there is a substantial conflict in the evidence.

3. New trial 🔑71
Trial 🔑143

Conflicts in the evidence are addressed in the first instance to the jury and in the second instance to the trial judge on motion for new trial.

4. Appeal and error 🔑1002

An appellate court will not reverse a judgment merely because of conflicts in the evidence.

5. New trial 🔑9

A new trial should be granted on all the issues and not merely on issue of damages, where question of defendant's liability has not been determined by the jury.

6. New trial 🔑9

A $120.25 verdict for motorist expending that amount in the care of his injuries and $203.64 in the repair of his automobile and sustaining general damages as the result of his injuries was so inadequate as to indicate that jurors did not agree as to whether defendant was negligent and as to whether such negligence was the proximate cause of the automobile collision, and hence a new trial on all the issues and not merely on issue of damages should have been awarded.

7. Damages 🔑96

Setting the amount of general damages involves an exercise of a broad discretion by the triers of fact in reaching a just conclusion as to the amount that will compensate an injured party for the loss suffered.

8. Damages 🔑127

The amount of general damages awarded should always have a reasonable relation to the loss suffered.

9. Damages 🔑96

The facts of each case and the sound discretion of the triers of fact should be permitted to govern the award of general damages.

10. Appeal and error 🔑1004(1)

An appellate court will reverse a judgment for greatly excessive or grossly inadequate general damages only where amount of award of general damages is so disproportionate to the injuries suffered that the result reached shocks the conscience.

11. New trial 🔑9

A trial judge should always exercise a reasonable control over verdicts, and, if he believes the amount of damages awarded seriously inadequate, he should grant a new trial on the question of damages alone.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Ray Wallace against Joe Miller to recover damages to property and for personal injuries resulting from a collision of two automobiles on a public highway. The jury awarded plaintiff damages in the sum of $120.25, and he moved for a new trial. From an order granting a new trial on the question of damages only, the defendant appeals.

Order reversed, with directions.

Farnsworth, Burke & Maddox, of Visalia (James K. Abercrombie, of Visalia, of counsel), for appellant.

Russell & Heid, of Tulare, for respondent.

MARKS, Justice.

This is an action to recover damages to property and for personal injuries resulting from a collision of two automobiles on a public highway of Tulare county on January 24, 1936. The jury awarded plaintiff damages in the sum of $120.25. He moved for a new trial. His motion was granted and a new trial ordered on the question of damages only. Defendant has appealed from this order.

The only question presented on this appeal is whether or not the trial judge abused his discretion in granting a new trial on the question of damages alone instead of granting a new trial generally.

It is admitted that the damages awarded were entirely inadequate. $120.25 was the amount of plaintiff's hospital, doctors' and other bills connected with healing his injuries. While defendant denied liability, he did not dispute the correctness of those charges. It was stipulated that plaintiff's automobile was damaged in the sum of $203.64. He also suffered personal injuries. If he was entitled to recover at all, he should have been awarded special damages in the sum of $323.89, concerning the amount of which there was no dispute, in addition to general damages in an amount sufficient to compensate him for his personal injuries.

The evidence on the question of negligence of the two drivers and the proximate cause of the accident was in sharp conflict. That offered by plaintiff, if accepted as true, was sufficient to prove that the negligence of defendant was the proximate cause of the accident. Evidence of about equal strength offered by defendant placed the sole blame for the accident on the driver of plaintiff's car. It is impossible to harmonize the two conflicting theories of the cause of the collision.

[1, 2] It is admitted by counsel for both parties that the trial judge is given a wide discretion in granting a new trial on the ground of insufficiency of the evidence to justify the verdict and the judgment entered upon it. It is also generally true that, this discretion having been exercised and a new trial having been granted, an appellate court will not reverse the order where there is a substantial conflict in the evidence.

[3, 4] The foregoing rules are based on the rule that conflicts in the evidence are addressed to the trier of fact—in the first instance to the jury and in the second to the trial judge on motion for new trial. The rule assumes that the triers of fact have weighed the evidence and have found the defendant guilty of negligence that proximately caused the accident. This having been done, an appellate court will not reverse the judgment merely because of conflicts in the evidence.

[5] Another situation is presented when it affirmatively appears from the record that nine of the jurors could not have agreed that the defendant was guilty of negligence which proximately caused the accident; that those jurors who conscientiously believed that defendant was not negligent departed from their beliefs while they entertained them and agreed to bring in a verdict for the plaintiff in a small and inadequate amount merely for the purpose of closing the case. Under such circumstances, the primarily important question, namely, the negligence of defendant, was not determined by the jury. It has been held that under such circumstances the trial judge should grant a new trial on all issues and that his failure to do so is an arbitrary refusal to exercise a reasonable discretion. See Murray v. Krenz, 94 Conn. 503, 109 A. 859; Southern Pacific Co. v. Gastelum, 36 Ariz. 106, 283 P. 719; Davis v. Whitmore, 43 Ariz. 454, 32 P.2d 340; Reay v. Beasley, Ariz., 66 P.2d 1043; Riley v. Tsagarakis, 53 R.I. 261, 165 A. 780; Munden v. Johnson, 102 W.Va. 436, 135 S.E. 832; W. T. Grant Co. v. Tanner, 170 Tenn. 451, 95 S.W.2d 926; Padayao v. Severance, 116 N.J.L. 385, 184 A. 514; James Turner & Sons v. Great Northern Ry. Co., N.D., 272 N.W. 489; Schuerholz v. Roach, 4 Cir., 58 F.2d 32; Simmons v. Fish, 210 Mass. 563, 97 N.E. 102, Ann.Cas.1912D, 588.

This question was before the court in the case of Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, 403. In that case the jury returned a verdict in plaintiff's favor in the sum of $5,000. Plaintiff's doctors', hospital and other such bills amounted to $2,423.37. His loss of compensation amounted to $3,441.72. He was seriously and permanently injured. The trial judge denied plaintiff's motion for new trial. Plaintiff appealed and sought a new trial on the question of damages only. In disposing of this issue the court said:

"The plaintiff has requested a new trial upon the issue of damages alone. He is entitled to such new trial upon that issue, but the question of limiting it to that issue alone is a very serious one. A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues. Donnatin v. Union Hardware & Metal Co., supra, 38 Cal.App. 8, at page 12, 175 P. 26, 177 P. 845. The verdict of the jury which found, in effect, that defendants were guilty of negligence and that plaintiff was free from contributory negligence and yet allowed damages which were grossly inadequate, furnishes convincing proof as said in the Donnatin Case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 177 P. 845, 'that in order to reach an agreement, the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged' (or, in our case, the additional issue that plaintiff was guilty of contributory negligence), 'nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made. * * * It would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry.' Just how much the jury was influenced by the instructions upon imputed negligence it is impossible to say. It may well be that the jury did not believe there was any contributory negligence upon the part of the plaintiff, but some jurors might also have believed under the evidence that the driver of the apparatus was negligent and that his negligence as a matter of law should be imputed to plaintiff, and in this mistaken belief they might have surrendered their convictions as to the amount of damages they should award. On the other hand, it is possible under the evidence that some of the jurors believed that the driver was negligent and that plaintiff contributed proximately to the accident by, with knowledge of such negligence on the part of the driver and of the conditions constituting such negligence, failing to warn the driver or persuade him to stop or slow up, and such jurors surrendered their convictions in this behalf in exchange for a verdict for low damages. In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin Case, supra, 38 Cal.App. 8 at page 11, 175 P. 26, 177 P. 845), '* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of "splitting it up" between different judges and different juries.'" See, also, Donnatin v. Union Hardware Co., 38 Cal.App. 8, 175 P. 26, 27, 177 P. 845, where the same rule is announced.

[6] When we apply the rules which have heretofore been announced to the facts before us the conclusion is inevitable that nine jurors did not agree on the most important questions of defendant's negligence and its proximate cause of the collision. There is no other explanation for the inadequate verdict, unjust to plaintiff, had there been an agreement on defendant's liability. If the jurors had agreed on defendant's liability, their verdict should have included $120.25 expended by plaintiff for care of his injuries. The correctness of this amount was not disputed. It should also have included $203.64 spent for the repair of his car, the correctness of which amount was stipulated. In addition to these amounts the verdict should have included an award of general damages, for plaintiff was injured in the accident. From these facts "it is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made." Donnatin v. Union Hardware & Metal Co., supra. It follows that, as the question of the liability of defendant was not determined by the jury, a general order granting a new trial should have been made. The case should be retried on all issues.

We find nothing in the case of Tripcevich v. Compton, Cal.App., 77 P.2d 286, that necessarily conflicts with the conclusions we have reached. The court there merely held that on the record before it the trial judge did not abuse his discretion in granting a new trial on the question of damages only.

[7-10] As far as appears from that opinion, the damages awarded were general and there were no special damages involved, especially special damages concerning the amount of which there was no controversy. Setting the amount of general damages involves an exercise of a rather broad discretion on the part of the triers of fact in reaching a just conclusion as to the amount that will compensate an injured party for the loss suffered. This is a question upon which there is often, we might be justified in saying, frequent, divergence of honest opinion in cases where there might be no difference of opinion on the question of liability. While the amount of general damages awarded should always have a reasonable relation to the loss suffered, there of necessity can be no fixed rule of the exact measure of general damages to be awarded for somewhat similar injuries. The facts of each case and the sound discretion of the triers of fact should be permitted to govern the award of general damages in practically all cases. It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages.

[11] In the Tripcevich Case the amount of general damages awarded does not necessarily indicate a disagreement on the question of liability and a compromise verdict without an agreement on that question. There being an agreement among the jurors on liability, that portion of the judgment might well be permitted to stand undisturbed. A trial judge should always exercise a reasonable control over verdicts and, if he believes the amount of damages awarded seriously inadequate, he should grant a new trial on the question of damages alone. This is what was done in the Tripcevich Case, and the appellate court merely held that there was no abuse of discretion on the part of the trial judge in the course he followed.

The order appealed from is reversed, with directions to the trial court to grant plaintiff's motion for a new trial without limitation and to retry the case on all issues.

We concur: BARNARD, P. J.; JENNINGS, J.

25 Cal.App.2d 683

LOGAN v. ANDREWS et al.

Civ. 5992.

District Court of Appeal, Third District, California.

April 13, 1938.

Hearing Denied by Supreme Court June 2, 1938.

1. Principal and agent 🔑23(3)

Evidence of agency could be found in fact that alleged principal acquiesced in recognizing or acknowledging similar acts done on other occasions by the assumed agent.

2. Evidence 🔑265(6)

In action to rescind a contract for the exchange of stock which had been deposited in escrow, statement of defendant that he was undisclosed principal of party contracting with plaintiff, that defendant's attorney had prepared escrow, that contract contained one or two matters which defendant did not understand, and that defendant wanted plaintiff to surrender the contract, was an implied admission that defendant understood, in part, the terms of the escrow, and that he wanted a cancellation of the contract, which carried with it an admission of liability.

3. Principal and agent 🔑22(2)

Although declarations of a person that he is the agent of another is not usually competent evidence of the agency, unless made in the presence of, or communicated to, and acquiesced in by, the principal, nevertheless, where prima facie evidence of such agency has been first shown, the declarations are admissible.

4. Evidence 🔑77(5)

In action on contract, where plaintiff sought to hold defendant liable as undisclosed principal of party with whom plaintiff contracted, and defendant did not call the purported agent as witness to disprove the asserted agency, inference was authorized that agent's testimony, if given, would have been adverse to defendant. Code Civ.Proc. § 1963.

5. Corporations ⚷121(5)

In action to rescind a contract whereby plaintiff agreed to transfer his stock in a company, in consideration of the cancellation of an obligation and a reconveyance to plaintiff of land held as security wherein defendants assigned the stock received to another defendant and such defendant failed to carry out the agreement, evidence *held* to justify judgment in plaintiff's favor as against assignee of the stock on the ground that he was the undisclosed principal of the defendants who actually executed the transaction.

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by John A. Logan against Miles Andrews and others for redelivery to plaintiff of certain stock or for judgment in the sum of $10,000. Judgment for plaintiff, and defendant B. I. Malouf appeals.

Affirmed.

Charles L. Nichols and Schell & Delamer, all of Los Angeles, for appellant.

C. Arden Gingery and Dwight W. Stephenson, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

This is an appeal by defendant Malouf from a judgment rescinding a written contract and directing appellant, among other defendants, to redeliver to plaintiff certain shares of stock of the First Bond & Mortgage Company of Glendale, or in lieu thereof, for judgment in the sum of $10,000.

The statement of facts as set forth in the briefs are quite involved, but it appears that in August, 1933, plaintiff was the owner of certain shares of stock of the mortgage company, and was also indebted to it in the sum of $11,500 secured by a deed of trust on certain real property. About that time, as alleged in the complaint, Miles Andrews, acting for himself and as agent for the defendants above named, including Malouf, appellant herein, entered into an agreement with plaintiff whereby plaintiff agreed to transfer to Andrews and one Styskal all of plaintiff's interest in the company, in consideration of the cancellation of the $11,500 obligation and the reconveyance to plaintiff of certain of the land held as security. This was agreeable to the parties concerned and the stock was transferred to Andrews and Styskal. Subsequently, these two assigned all of their interest in the stock to appellant Malouf as owner. Thereafter, respondent demanded of Malouf and the other defendants above named that the agreement be carried out and the note canceled, and the property reconveyed. Upon refusal, this action was commenced praying that defendants be required to deliver to plaintiff the stock in question, or, in default thereof, for judgment in the sum of $10,000.

The answer of defendant and appellant Malouf admitted the purchase of the stock from his codefendants but denied the remaining allegations of the complaint. As a separate defense it was alleged that plaintiff was an officer of the corporation and the contract was an attempt on his part to gain for himself a valuable asset of the corporation, which was contra bonos moros, and plaintiff was thereby estopped from maintaining the action.

A further defense was that appellant was not bound by the contract, and that Malouf purchased the stock for a valuable consideration without notice of any contract between plaintiff and Andrews and Styskal.

As grounds of appeal it is urged the evidence was insufficient to support the judgment in many specified particulars, and especially challenged the finding that Andrews acted as agent for appellant Malouf. A determination of that particular issue will go far to solve the many problems here presented, and we will direct our attention particularly to that phase of the appeal. To do that, a review of all the evidence which, if given credence by the trial court, would logically lead to the conclusions of the court is necessary. We need not consider evidence contradictory thereto, however abundant, as it is only necessary here to determine whether or not the evidence, if believed by the court, was sufficient to justify the findings and judgment.

The mortgage company was a corporation having both preferred and common stock, and the contract thereof, as far as this case is concerned, was held by plaintiff. In addition to being an organizer, plaintiff was also a director of the corporation and its president, and, as before set forth, was also indebted to the corporation in the sum of $11,500, which indebtedness was evidenced by a promissory note and secured by a deed of trust on some 56 acres of land.

In June, 1933, the holders of the corporate stock, including plaintiff, entered into a written agreement with Fontaine and Halloran whereby these two agreed to purchase the stock of plaintiff and certain others.

This deal was not consummated, and some time in August of the same year Halloran introduced defendant Miles Andrews to plaintiff stating that he, Halloran, and his associates were unable to go on with the option to purchase, and that Andrews was interested in making the deal. Some preliminary discussion was had between Andrews and plaintiff wherein plaintiff inquired of Andrews as to his financial ability to undertake the transaction, and also told Andrews that if he bought the stock that he, the plaintiff, would expect Andrews to take care of plaintiff's obligation to the corporation. This was agreeable to Andrews, and a meeting with the other proposed sellers and Andrews was arranged for a later date. Subsequently, Andrews deposited $10,000 in escrow, and Andrews was elected a director and president of the corporation. This escrow was opened in the name of Andrews and L. J. Styskal, an attorney. Andrews then entered into a contract with respondent under date of August 30, 1933, in which it was provided that if, as, and when the said escrow was closed and completed Andrews would procure the cancellation of respondent's obligation to the corporation if the respondent would convey to the corporation a designated parcel of the real property secured by the deed of trust. Upon the signing of this contract respondent transferred his stock into the escrow and thereafter the escrow was closed and the purchase of the stock completed.

It now becomes necessary to consider the evidence in the record tending to establish Andrews as the agent for appellant Malouf.

The block of stock held by respondent Logan was sufficient to control the corporation. This fact of course was known to Andrews, Styskal, and Malouf. During early negotiations respondent had stated that he was not interested in selling his stock if the corporation was to be liquidated. One of the reasons perhaps, in impelling Malouf to conceal his interest in the deal, was the fact that he owned and operated a large competing business, the Standard Discount Corporation, and it might occur to respondent that Malouf's object in acquiring the Bond & Mortgage Company was to absorb or merge that company with his already established concern.

The interest of Malouf also appears early in the transaction, for it was upon his suggestion that Styskal, who had been his attorney for some years prior thereto, became interested in the purchase with Andrews, in order that he, Styskal, could advise Andrews and Malouf. Styskal could also see that the plan of Malouf was carried out in the arrangement of the escrow, and in also advising Andrews in obtaining the stock. The fact that Andrews, and Styskal, the personal attorney of Malouf, were authorized to act jointly also indicates that Andrews was acting for Malouf, for in that way Malouf had a further check on the plans of Andrews. The testimony of Styskal indicated also that he was acting under direct orders from Malouf, and that it was to Malouf that he was reporting as to the progress of the negotiations and the contents of the escrow agreement.

Some question arose as to the authority of certain persons to transfer the stock held by the Campbell estate, the objection thereto being raised by Styskal, the attorney, although the stock was being purchased in the name of Andrews, but as subsequently appears the Campbell stock was transferred through the escrow, not to Andrews, but to appellant herein. Also it will be noted that during these negotiations both Andrews and Styskal used appellant's automobile—further evidence of the interest of Malouf. So too, after the escrow was completed and it became time to designate the successors of some of the original directors of the company, the designation of these directors was not the work of Andrews but were the nominees of Styskal and appellant. Also, in spite of the fact that the escrow was in the name of Andrews, the escrow provided that the nomination of these new directors was to be by Andrews and Styskal.

On the day the escrow was closed a stockholders' meeting was held at which it was apparent that there was a vacancy in the fifth directorate. Upon the following day, so the minutes recite, director Styskal suggested that Mr. Malouf was one of the stockholders of the corporation, and that he was competent to be on the board and would make a desirable director, and he was thereupon duly elected. If it had not been the studied plan to place Malouf on the board, the fifth director could have been elected at the meeting of September 11th, just the day prior to the closing of the escrow, when the other four positions were filled on the board, except for the fact that on that day the stock had not then been indorsed to Malouf.

It is also apparent that the money that went into the escrow to pay for the stock was furnished by appellant. Checks were drawn on his account and were indorsed by Andrews and Styskal, and Styskal, being admittedly appellant's agent, made that act that of the principal himself. Furthermore, these checks were never in the possession of Andrews but remained in the custody of Styskal and were always subject to appellant's control.

Examination of the indorsements on the stock certificates also reveals as to the preferred stock as well as some of the common stock that such stock was purchased directly from the owners and transferred to appellant. None of the certificates went to Andrews. As far as the corporate records were concerned Andrews never became the owner of these shares, which is also some evidence that Andrews was acting for appellant in acquiring the stock for him as his agent.

At the first director's meeting after the escrow was closed, the corporation was dominated by Malouf. Styskal and his two aides, Thompson and Webb; defendant Andrews taking no part in the proceedings. The subsequent acts of directors in electing appellant president and making him general manager at the salary of $500 per month with authority to manage all of the business of the corporation indicated that the directors were apparently acting for appellant and not for defendant Andrews, although they had been elected directors prior to the closing of the escrow, and before Malouf was known in the transaction. It is apparent they were elected not for the benefit of Andrews but for the benefit of appellant.

The day following the closing of the escrow respondent saw appellant at the corporation's office and told him that he understood that he, the appellant, was in charge of the company and told him of his agreement with Andrews in regard to the cancellation of his promissory note and demanded performance tthereof. Appellant did not at that time deny the agreement nor knowledge thereof nor of Andrews' authority to make the same, but replied that if the agreement was legal it would be carried out. A few days later respondent again asked appellant in regard to the performance of the agreement, and again appellant did not deny his liability but merely stated that he "wanted further time." On a third occasion, perhaps two weeks after the closing of the escrow, respondent again demanded performance on the part of appellant, and again appellant did not deny that he was liable on the agreement or that Andrews was not his agent in making the same, but told respondent that unless he would release him from the agreement he would expose respondent to the stockholders. Again some time later when respondent, Andrews, and appellant were together, appellant asked respondent if he would co-operate with him and introduce him to the stockholders as a man of experience and ability, and if he would do that, he, Malouf, would perform the contract.

In November, 1933, at a stockholder's meeting respondent again demanded of appellant performance of his agreement. At that time appellant threatened to bring suit against the holders of the stock unless respondent would write a letter to him, appellant, relieving him of responsibility under the agreement. At the same time appellant told respondent that he, appellant, had drawn the escrow instructions and that respondent could be held on said contract. All of these remarks and the attitude of appellant is indicative of the fact that appellant recognized his responsibility or at least recognized the fact that Andrews in signing the agreement with respondent was acting as his agent.

[1] A somewhat similar agreement to that with respondent had been entered into at the time of the negotiation for the purchase of stock between defendant Andrews and one W. H. Andrews. After the termination of the escrow, W. H. Andrews demanded performance by appellant. After some delay this contract was recognized and paid. Appellant claimed that the settlement with W. H. Andrews was under a different contract or agreement, but W. H. Andrews testified that he never had any other but the one agreement with appellant. This

circumstance is of some interest inasmuch as evidence of agency may be found in the fact that the alleged principal acquiesced in recognizing or acknowledging similar acts done on other occasions by the assumed agent.

[2] The admission of appellant to the stockholders at their meeting in November, 1933, indicated that he was the undisclosed principal and that Andrews was his agent. He at that time told the stockholders that he had his attorney prepare the escrow and that there were two or three matters that were put in there, of which he did not understand the details, and asked the stockholders of record and Mr. Logan that he surrender the contract he had with Andrews. This statement is an implied admission that he understood in part, although perhaps not completely, the terms of the escrow, and furthermore that he wanted a cancellation of the contract which also carried with it some admission of liability.

[3] While it is true that the declarations of a person that he is the agent of another is not usually competent evidence of the agency, unless made in the presence of or communicated to, and acquiesced in by, the principal, nevertheless, where prima facie evidence of such agency has been first shown, such declarations are admissible. Dooley v. West American Commercial Ins. Co., 133 Cal.App. 58, 23 P.2d 766.

When, therefore, we examined the statements made by Andrews, we find in one of the early interviews between Andrews and the respondent, Andrews said he wanted to look over the audit and would let him know at an early date whether he and his associates would purchase the stock. After some negotiations respondent stated to Andrews that he would take 95 cents on the dollar, to which Andrews replied that he would let him know in a few hours whether or not that offer was acceptable, indicating that he had not the power within himself to accept or reject the counter offer. Later, when respondent demanded of Andrews that he perform the agreement to take up the note, he stated "Malouf was the boss." In the same conversation, Andrews made some reference to the fact that appellant had not yet paid him all of his commission, which also is some evidence of agency. In a conversation had between appellant and certain of the stockholders he stated that he had paid $57,000 for the control of the corporation, and had paid defendant Andrews off, which is confirmation of the statement by Andrews that he was to receive a commission from appellant. About the time the escrow was opened Andrews stated at that time that "he and his associates were buying the control of the * * * corporation."

It is to be remembered also that appellant admitted that he was represented by defendant Styskal as his attorney. If Andrews and appellant were not acting jointly, it hardly seems probable that Andrews would have employed the same attorney as Malouf, from the fact that Styskal could not, in good faith, have represented both parties at the same time, as their interests were antagonistic.

It is to be noted, too, that in this matter before the trial court Styskal acted as attorney for appellant, himself, and Andrews, although Styskal stated that Andrews had taken no interest in the litigation.

[4] Unless there was unity in purpose between these various defendants, it seems reasonable to assume that Styskal would have taken steps to relieve himself as attorney of record for an indifferent client unless he was acting for the three jointly and not any one in particular. It is also of interest to know that Andrews was not called as a witness to disprove the facts of asserted agency, the only witness perhaps who could testify directly as to that matter. This, in accordance with section 1963 of the Code of Civil Procedure, raised the inference that Andrews' testimony, if given, would have been adverse to appellant. In fact, an examination of the entire record fails to reveal any testimony on the part of the appellant denying the evidence of respondent as to the statements and admissions of appellant Styskal or Andrews.

It is urged by respondent that if an agency is not established in the first instance the facts in evidence do indicate a ratification by appellant. We feel that we need not discuss that phase of the case, as in our opinion the acts sufficiently establish the relationship of principal and agent.

[5] Many other points are raised by appellant in his opening brief of some 100 pages, which are discussed in the brief of respondent of something over 500 pages, but we believe what we have said is sufficient to justify the finding of the court that Malouf, appellant herein, was the undis-

closed principal, and that the judgment of the trial court in so finding was correct.

The judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

26 Cal.App.2d 73

NADERHOFF v. PRUDENCE MUT. LIFE INS. ASS'N.

Civ. 5976.

District Court of Appeal, Third District, California.

April 20, 1938.

Rehearing Denied May 20, 1938.

Hearing Denied by Supreme Court June 17, 1938.

1. Insurance 🔑608

In action to recover judgment on a membership certificate against a mutual life insurance association which admitted liability except as to amount, form of action could be disregarded, even though mandamus to levy an assessment would have been the proper remedy, where pleadings, after praying for a judgment of $3,000, contained a prayer for such other relief as might be meet and proper. Civ.Code, §§ 452a–453, now St.1935, p. 657, § 10640 et seq.

2. Insurance 🔑66

Funds accumulated by mutual insurance associations under statute providing a reorganized plan for conducting such associations are "trust funds" which cannot be diverted to purposes other than those for which they are collected, and hence money contributed by persons who became members of an association under a reorganized plan subsequent to the death of an old member could not be applied in extinguishment of his beneficiary's claim. Civ.Code, §§ 452a–453, now St.1935, p. 657, § 10640 et seq.

[Ed. Note.—For other definitions of "Trust Fund," see Words & Phrases.]

3. Insurance 🔑56

Damages, if any, suffered by a beneficiary named in a membership certificate because of negligence of board of directors of a mutual life insurance association with respect to levying an assessment could not be recovered from association, but damages would constitute a personal liability of board.

4. Insurance 🔑515

The amount to be paid and the method of raising the money under a mutual life insurance contract depend on terms of contract, since a policyholder's rights and insurer's liability on such a contract depend on wording of contract.

5. Insurance 🔑518

A provision in a mutual life insurance association's by-laws, which became part of agreement between deceased member and association, limiting amount to be paid on membership certificates to amount actually collected by assessment levied to raise money to pay death claims based thereon was valid, and a beneficiary's right to recover was limited to amount of money raised by an assessment to pay her death claim. Civ. Code, §§ 452a–453, now St.1935, p. 657, § 10640 et seq.

6. Insurance 🔑195(1)

The board of directors of a mutual insurance association act somewhat judicially in making assessments, and necessarily must take into consideration the association's financial status and response of members to assessments as levied.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Latoney Ernestina Naderhoff against the Prudence Mutual Life Insurance Association on a membership certificate naming plaintiff as beneficiary. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed, with directions.

Charles H. Epperson, of Stockton, for appellant.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant in this action is a California Mutual Life Insurance Company organized under sections 452a–453 of the Civil Code, which sections are now supplanted by the Insurance Code of the state of California, beginning with section 10640, St.1935, p. 657.

On the 8th day of December, 1932, being at a time after the organization of said Mutual Life Insurance Association, August

Naderhoff, then the husband of the plaintiff in this action, became a member of the appellant association. The certificate issued to him was for the maximum sum of $2,000, with a provision contained therein that if death were accidental, the amount of recovery should be the sum of $3,000. Naderhoff was killed on the 16th day of October, 1935, in an automobile accident. Plaintiff began this action to recover judgment on the certificate mentioned, and obtained judgment thereon for the sum of $3,000. From this judgment, the defendant appealed.

The complaint in the action sets forth the issuance of a membership certificate to August Naderhoff, on the date mentioned; his death by accidental means; that the plaintiff is the beneficiary named in the certificate; that the insurance covenanted to be paid has not been paid; that demand has been made upon the defendant for the payment of said sum of $3,000, which has not been paid; and that the defendant has refused to pay the same or any part thereof.

The answer of the defendant, after setting out the terms and conditions of the policy and the by-laws of the association, which, by the terms of the certificate of membership became a part, and were made a part of the agreement between August Naderhoff and the association, then admits that Naderhoff during his lifetime performed all the conditions required to be performed by him, and that the plaintiff in this action has done so, save and except that the action in question was brought prematurely.

While the complaint in the action alleges that the defendant has refused to pay any part of the stipulated sum, there is nothing in the record in this case, or in any of the pleadings, to the effect that the board of directors of the association ever approved or rejected the claim filed by the plaintiff for payment to her, under the terms of a membership certificate issued to her deceased husband, in which she was named as beneficiary.

The briefs indicate that a former trial was had of this action, but nothing as to the issues tendered in that action are disclosed by the record in this case. In the present action, liability on the certificate of membership issued to August Naderhoff (now deceased), is not denied. One question raised is as to the application of the by-laws which are made a part of the certificate of membership issued to Naderhoff, in which the amount of the insurance to be paid is limited by the terms of the agreement, and the method of raising the money with which to make such payment; also, the question as to whether the action is in proper form, in that it should have been one in the nature of mandamus to compel a levying of an assessment to pay the Naderhoff claim in advance of the date when such an assessment was levied; likewise, an issue was raised as to whether the action was prematurely brought; there being a clause in the agreement purporting to prohibit the beginning of an action prior to six months after the date of the death of a member.

[1] While under the authorities called to our attention, and which we have considered, and the liability on the certificate of membership being admitted, save and except as to the amount, it appears that mandamus to levy an assessment would have been the proper remedy, but owing to the fact that the pleadings in this case, after praying for a judgment of $3,000, does contain a prayer for such other relief as may be meet and proper in the premises, the form of the action may be disregarded.

The record shows that some time after the beginning of this action the defendant did levy an assessment upon the members then liable for the purposes of raising money with which to make payment of the plaintiff's claim. This levy was made within six months after the death of August Naderhoff. The membership certificate issued to the deceased specifies that the Prudence Mutual Life Insurance Association insures the person designated as a member for the amount named therein, payable as specified, subject to the provisions, conditions, and warranties printed on the back thereof, which were made a part of the contract as fully as though recited over the signatures thereto affixed. The certificate then purports to insure the life of the deceased for the sum of $2,000. The third paragraph raises this amount to the sum of $3,000, in the event of the death of the insured member, by accidental means, prior to his attaining the age of sixty years. The plaintiff in this action is then named as the beneficiary therein. The policy then provides for the levy of death assessments, limiting the amount of the assessment to the sum of $2. All money received by reason of any death assessment was to be placed in the benefit fund of the association, otherwise known as the "mortuary fund." The policy then provided that all death claims should be paid in the order in which they occur and are approved, in accordance with the by-laws of the association. On the back of the policy there appeared certain terms by which the member bound himself to, and the parties signing the membership certificate constituted and made a part of the agreement, the articles of incorporation of the association, by-laws of the association, and all amendments thereto. The by-laws provided that upon the death of a member of the association an assessment might be levied upon the surviving members in a sum not exceeding $3. Heretofore, as appears from the record, the sum of the assessment appears to have been limited to $2, which probably is a clerical error in the preparation of the transcript.

Section 1 of article 14 of the by-laws directs that upon the death of a member in good standing, and satisfactory proof thereof, where filing a claim is necessary there shall be paid to the beneficiary as in full settlement of any such claim, a death benefit, the amount of which shall be determined as hereafter mentioned. The by-laws then provide for ascertaining and determining the amount to be paid, as follows, to wit: "Provided, further, that the amount aforesaid to be paid is conditioned upon there being a sufficient number of members in good standing in the Association at the time of the death of said member to enable the death assessments so levied to produce, and which death assessment does actually produce, a sum sufficient to pay the amount aforesaid to be paid upon said certificate, or as mentioned in said policy, and provided, further, that if said death assessment shall be collected from members of the Association at the time of the death of such member, and is actually collected, or that the necessary amount to pay such certificate shall be in the mortuary fund of the Association, and should there be fewer members than may be necessary to produce the amount specified to be paid in the certificate and/or policy or actually collected by virtue of said death assessment, then the amount to be paid shall be reduced to the sum such assessment produced, less expenses attendant thereto."

It is further provided in the by-laws that death claims shall be paid exclusively from the mortuary fund. The agreement between August Naderhoff and the association, as shown by the findings of fact, was to the effect that all death claims under the policy would be paid in the order in which they occurred and were approved, in accordance with the by-laws of the association.

At the time of the death of August Naderhoff there was on hand in the mortuary fund of the association the sum of $6,250.07, but the court further finds that on the date of the death of August Naderhoff there were death claims pending against the association in excess of said sum. While not mentioned in the findings, the testimony shows that the death claims pending against the association on the 21st day of October, 1935 (the date of the death of August Naderhoff), amounted to the sum of $44,500.

The court further finds that on the first day of April, 1936, the appellant levied an assessment against all its members in good standing as of October 21, 1935, to-wit: Being of the number of 761, which assessment, being for three persons deceased, brought the association the sum of $2,747.85; that the association attempted to make distribution thereof, and tendered to the plaintiff, plaintiff's proportionate share thereof in the sum of $915.95. The court then finds that at the time of the death of August Naderhoff the plaintiff was entitled to her proportionate share of the mortuary fund then in the possession of the appellant, not stating the sum, which the evidence shows to be between $300 and $400 only. The court further finds that the prohibition against beginning a suit prior to six months after the date of the death of the deceased had been waived by the appellant.

The court further found that if an assessment, because of the death of August Naderhoff, had been levied within a reasonable time from and after the 21st day of October, 1935, upon the members in good standing, the defendant's association, subject to said levy, would have produced an amount in excess of a sum sufficient to pay the plaintiff's claim. Our attention has not been called to any testimony, nor have we found any testimony in the transcript supporting such finding.

In an attempt to raise money by assessments for the purpose of paying the death claims preceding the death claim filed by the plaintiff in this action, and having precedence thereof, the association levied a number of assessments for the purpose of discharging the claims which we have stated totaled the sum of $44,500. Upon these assessments there was realized the sum of $25,800, which became a part of, and was paid out of, the mortuary fund. This testimony, so far as it bears upon the ability of the association to raise money by assessments, shows a rapid lessening of such ability, and likewise the testimony shows a rapid falling off in the membership of the association. Just when the membership declined from approximately 1,900 on or about the 1st of October, 1935, to 761 at the time an assessment was levied covering the Naderhoff claim, does not appear.

[2] The Legislature in 1935 repealed the sections of the Civil Code under which the association had been formed, and enacted a comprehensive scheme for the government of mutual associations, beginning with section 10640 of the Insurance Code. Subdivision (d) of that section reads as follows: "The member's liability to contribute to the payment of losses accrued, or to accrue, is not a fixed sum but is dependent upon the amount needed to pay such losses in full as they arise during his membership. Such liability does not cease upon lapsation of such membership."

As the law now stands, the liability of a member does not terminate upon the lapsing of membership, but does depend upon the fact of death of a member during the membership of the person called upon to pay. The former provisions of the Civil Code contained nothing to this effect. Upon the lapse of one's membership in the association there appears nothing in the Code provisions which would charge such former member with liability for payment on account of death occurring during his membership. By the provisions of section 10640, supra, new members are not charged with liability for the payment of death claims where the death occurred prior to such person becoming a member of the association.

The reorganized plan for the conducting of such mutual associations provides for the accumulation of certain funds. These funds are trust funds, and we need not cite authorities to the effect that trust funds cannot be diverted to purposes other than those for which the funds are collected. Thus, moneys contributed by persons who have become members of the association under the revised plan subsequent to the death of Naderhoff cannot be applied in extinguishment of the plaintiff's claim.

[3] No issue is raised by the pleadings in this action calling for a judgment in the way of damages for any alleged negligence on the part of the board of directors of the association in not levying an assessment to cover the Naderhoff claim prior to the 1st day of April, 1936. Being a mutual association, and the funds contributed and collected for certain purposes, any damages which the plaintiff may have suffered by reason of the negligence of the board of directors cannot be recovered from the association. Such damages, if any, would constitute the personal liability of the board of directors.

[4] Upon a mutual contract of insurance, as well as upon any ordinary contract, the rights of the policyholder and the liability of the insurer depend upon the wording of the contract. Boyer v. U. S. Fidelity & Guaranty Co., 206 Cal. 273, 274 P. 57; Taketa v. Policy Holders' Life Ins. Ass'n, 131 Cal.App. 551, 21 P.2d 646. Thus, the amount to be paid, and the method of raising the money, depends upon the terms of the contract.

In 37 C.J. 412, the rule is thus set forth: "In a case of assessment life insurance the amount of liability will depend upon the terms of the contract. Under some contracts there may be a recovery only of the amount not exceeding a certain sum actually realized on an assessment, while under other contracts there may be a recovery of the amount which a certain assessment on the members would realize if made, regardless of whether or not it is in fact made and collected."

In 45 C.J., beginning on page 231, § 182, the liability of an insurance company upon the various terms appearing in the contract is set forth as follows: "The amount of benefits which the society is liable to pay in a given case depends on its charter of incorporation or articles of association, its constitution and by-laws, and the terms of the certificate of insurance. Where there is no regular certificate, the amount payable is not such amount as the jurors' consciences may approve as just, but the amount provided for in such a case by the charter and by-laws of the association. By its constitution and by-laws the society may obligate itself to pay a sum certain specified in the certificate, or to pay the proceeds of an assessment, or a certain percentage thereof, collected from the whole membership; or the amount may be limited to the proceeds of an assessment levied against a particular class or group of members. So the amount of benefits may be made to depend on the number of members in the society, or in a particular class thereof, at the time of the member's death, irrespective of the amount specified in the certificate, and regardless of whether all such members had paid their assessments; or the amount may even be made to depend on the amount of a specified sum on hand at the time the member dies. The right to benefits according to the particular class to which the member belonged, cannot be affected by the wrongful rejection of a member from, or by the abolition of, that class. A contract to pay a certain endowment is not invalidated as unconscionable because of the fact that the member is required to pay only a much smaller sum by way of assessments. Where a society's charter provides what disposition is to be made of the fund due from the society on account of membership such provision governs in preference to the will of the member, and the widow can recover no more than the share provided for widows, notwithstanding the terms of the member's will gave her a larger share. The difference in the age of the member and the age stated in the application will be taken into consideration in determining the amount to which the beneficiary is entitled."

[5] Following the rule laid down in the Taketa Case, supra, and the authorities just cited, the liability of the appellant depends upon the amount of money raised upon an assessment to pay a death claim, and is limited by such amount.

In 45 C.J. 18, we find the following: "A beneficiary cannot seek to recover on a certificate, and at the same time repudiate it by asserting the invalidity of a provision limiting the liability of the society."

The validity of a provision in the by-laws of the association which became a part of the agreement between Naderhoff and the association, limiting the amount to be paid on the certificate to the amount actually collected by an assessment levied for the purpose of raising money to pay a death claim based thereon, is further supported by the following cases: Canfield v. Knights of Maccabees, 87 Mich. 626, 49 N.W. 875, 13 L.R.A. 625, 24 Am.St.Rep. 186; Pool v. Brotherhood, etc., 143 Cal. 650, 77 P. 661.

It further appears that in levying assessments for the payment of death claims by the association, it became necessary to space the levies so that the membership might not wholly abandon the type of insurance issued by the association and leave the association with no membership.

[6] It is also shown by the testimony that the membership was falling off very rapidly, and the amounts realized by the different assessments were becoming considerably lessened. That the board of directors of an association act somewhat judicially, and necessarily must take into consideration the financial status of the association and the response of the members to the assessments as levied, appears to be supported by the following cases: Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 76 N.W. 1026, 73 Am.St.Rep. 326; Barrows v. Mutual Reserve Life Ins. Co., 7 Cir., 151 F. 461, and cases there cited.

Under the state of the record we do not need to decide whether the association should have prorated the amount of money in the mortuary fund at the date of the death of the deceased, and settled the plaintiff's claim for a much less figure than the sum collected by an assessment for that purpose; nor do we need to decide whether the action should have been by way of mandamus to require the board of directors of the association to levy an assessment at an earlier date.

The complaint, while in an action asking for a money judgment in the sum of $3,000, also contains a provision in effect praying for such other and further relief as may seem just and proper. The association having levied an assessment, and having obtained the sum of $915.95, available for payment of the plaintiff's claim in accordance with the provisions of the agreement between Naderhoff and the association, it follows that we may properly modify the judgment as entered against the association by striking therefrom all of the sum allowed by the court in excess of $915.95; and it is so ordered.

The trial court is directed to modify the judgment as heretofore entered, and enter a new judgment allowing the plaintiff the sum of $915.95, and, as so modified, the judgment is affirmed.

It is further ordered that the parties hereto pay their own costs on this appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

26 Cal.App.2d 42

COLLINS v. NELSON et al.

Civ. 11386.

District Court of Appeal, Second District, Division 1, California.

April 19, 1938.

Rehearing Denied May 11, 1938.

1. Judges 🔑51(4)

The act providing that no judge shall sit or act as such, "when it is made to appear probable" that fair and impartial trial cannot be had before him because of his bias or prejudice, contemplates determination of such question, at least in first instance, by judge agreed on by parties. Code Civ. Proc. § 170, as amended by St.1933, p. 1806.

2. Appeal and error 🔑874(5)

The issue as to whether facts, alleged in plaintiff's affidavits supporting motions, denied by trial judge, for his disqualification, made it appear probable that fair trial could not be had before him because of his bias or prejudice, is not properly presented for review on appeal from his subsequent order granting defendant's motion for new trial, as statutory provision for determination of such question by another judge were disregarded by trial court. Code Civ.Proc. § 170, as amended by St.1933, p. 1806.

3. Judges 🔑51(4)

The filing of plaintiff's verified statement of facts constituting ground of asserted disqualification of trial judge ipso facto limited latter's authority to act further in case to extent and manner provided for by statute requiring that question of his disqualification be determined by another judge agreed on by parties, and all other purported acts by him were void ab initio. Code Civ.Proc. § 170, as amended by St.1933, p. 1806.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Betty Collins, a minor, by Ray A. Collins, her guardian ad litem, against Jack Nelson a minor, and others. Verdict for plaintiff, and from an order granting defendant's motion for a new trial after denying plaintiff's motion for disqualification of the trial judge, plaintiff appeals.

Orders of trial judge after filing of plaintiff's verified statement of grounds for judge's disqualification vacated, and cause restored to trial court's jurisdiction, with directions.

Avery M. Blount and E. B. Drake, both of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an order granting defendants' motion for a new trial.

The facts are as follows: An action was brought by Betty Collins, a minor, against Jack Nelson, a minor, as the result of injuries sustained while riding as a guest in an automoble operated by said Jack Nelson. The matter was tried before the court sitting with a jury. At the conclusion of plaintiff's case, a motion for nonsuit was presented on behalf of defendant Jack Nelson, which motion was denied. Thereafter, without producing any witnesses, said defendant presented a motion for a directed verdict, which was also denied. The jury returned a verdict in favor of plaintiff, whereupon counsel for the minor defendant made a motion for judgment notwithstanding the verdict, said motion being made in the alternative form, reserving the right to apply for a new trial if such motion were denied. The motion for judgment, however, was granted, and the court ordered said judgment to be entered in favor of defendants. Upon appeal by plaintiff, the appellate court reversed the holding of the trial judge and directed the court below to enter judgment on the verdict as rendered. Collins v. Nelson, 16 Cal.App.2d 535, 61 P.2d 479.

Defendants filed notice of intention to move for a new trial, on December 12, 1936. Following this, and on behalf of plaintiff, affidavits alleging disqualification, bias, and prejudice of the trial judge were filed; the trial judge thereafter filed affidavits denying such bias and prejudice.

On January 13, 1937, when the motion for a new trial was to be heard, counsel for plaintiff presented a written motion for disqualification of judge, requesting the court to refer the matter of his qualification to another judge, under the provisions of section 170 of the Code of Civil Procedure, as amended by St.1933, p. 1806. The trial judge denied said motion for disqualification and heard the motion for a new trial, which was thereupon granted. As heretofore stated, plaintiff at this time appeals from the order granting defendants' motion for a new trial.

Among several specifications of error, appellant contends, in substance, that the trial court was without jurisdiction to try the question of his own disqualification.

Section 170 of the Code of Civil Procedure, as amended, pertinent hereto, reads in part as follows: "No * * * judge * * * shall sit or act as such in any action or proceeding: * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such * * * judge, * * * a fair and impartial trial cannot be had before him. * * * Any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter * * * before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. * * * Every such statement * * * shall be verified by oath. * * * No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge requested to act by the chairman of the judicial council."

Respondents' position, in part, is as follows (quoting from respondents' brief): "We assume that the affidavits filed by appellant herein attempt to bring the question of the disqualification under subsection 5 of Section 170 of the Code of Civil Procedure. We seriously doubt if the affidavits charging or alleging bias or prejudice are sufficient to show even a probable bias or prejudice. It is a matter for this Honorable Court to determine whether or not the affidavits filed by appellant were sufficient to raise a question as to the disqualification of the trial court, and in the event this Honorable Court finds that such affidavits were sufficient to raise the question of disqualification to then determine whether or not other portions of Section 170 of the Code of Civil Procedure are applicable. Should it be held the affidavits were sufficient, and the question of the trial court's qualification should have been heard and determined by some other judge, it would follow that any subsequent orders made by a judge not qualified would have to be vacated, and the merits of the granting of the motion for a new trial are not involved herein."

It should be noted that, although appellant followed the procedural requirements of said section 170, the verified written "statement" is referred to as "affidavits" throughout the record of the appeal; therefore, to avoid confusion, wherever the words "affidavits" and "statement" appear in the within opinion, they may be regarded as synonymous.

[1, 2] So far as it relates to the appeal herein, the question as to whether the affidavits are sufficient to show probable bias or prejudice, is beside the issue. The statute provides, in substance, that no judge shall sit or act in any action or proceeding when it is made to appear probable that by reason of bias or prejudice of such judge a fair trial cannot be had before him. The expression "when it is made to appear probable" manifestly contemplates that the determination of such question, at least in the first instance, shall be addressed to the judgment of the judge requested, or agreed upon, to act, and in no event, as the statute further expressly provides, shall a judge who denies such alleged disqualification be permitted to hear or pass upon such question. The issue as to the sufficiency of the affidavits is identical with the issue as to whether the facts alleged therein make it "appear probable" that by reason of bias or prejudice a fair trial cannot be had. Thus far that issue has not been legally determined, for the provisions of section 170 of the Code of Civil Procedure were disregarded by the trial court. It follows, therefore, that there can be nothing in that regard properly presented for appellate review.

[3] By and with the filing of the verified statement by appellant setting forth the facts constitutng the ground of the asserted disqualification, the authority of the judge against whom such statement was directed, to act further in the premises, was ipso facto limited to the extent and in the manner provided for in section 170 of the Code of Civil Procedure. All other purported acts were and are void ab initio.

For the reasons hereinbefore stated, the orders made by the trial judge, after the filing by appellant of the verified statement above mentioned, are vacated, and the cause is restored to the jurisdiction of the trial court, with directions to proceed under and according to section 170 of the Code of Civil Procedure.

We concur: YORK, P. J.; WHITE, J.

26 Cal.App.2d 83

In re FRARY'S ESTATE.

CONNETT v. CHURCH.

Civ. 2125.

District Court of Appeal, Fourth District, California.

April 20, 1938.

1. Husband and wife 🔑246

Earnings acquired by husband and wife while residing in Oklahoma did not become community property upon their moving to California.

2. Husband and wife 🔑249

The acquisition of property by husband and wife as joint tenants with a right of survivorship created a separate estate in each, irrespective of what the interest of each was prior thereto.

3. Husband and wife 🔑266

The transfer of separate property into a joint tenancy may constitute a gift inter vivos but such is not necessarily the case where husband and wife use that form of contract to change their respective interests in property earned during the marriage into a joint tenancy.

4. Husband and wife 🔑266

The conversion of separate property into joint tenancy ownership by mutual agreement between a husband and wife, whereby each contributes separate property to a joint tenancy account, does not constitute a "gift" of such property by each to the other.

[Ed. Note.—For other definitions of "Gift," see Words & Phrases.]

5. Descent and distribution 🔑61

Under statute providing that, in case of death without issue, property acquired by "gift" from a predeceased spouse who owned the property prior to decease as his or her separate estate shall go to the children of the predeceased spouse, the survivor of a joint tenancy created by the purchase of property by husband and wife with funds constituting their separate property was entitled to take the entire property by right of survivorship, since the interest acquired by each through creation of the joint tenancy was not created by "gift" but by "contract." Probate Code, § 229.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

6. Descent and distribution 🔑61

The sister of the survivor of a joint tenancy created by purchase of property with separate funds of husband and wife was entitled to nominate an administrator for the estate of husband who died without issue subsequent to wife's death, even if part of the property came to the deceased husband as a gift from his wife so that children of predeceased wife would be entitled to such portion, since, in any event, relatives of deceased husband would be entitled to succeed to portion that husband himself had put into the joint tenancy. Probate Code, §§ 229, 422, 423.

◆

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding in the matter of the estate of Richard E. Frary, deceased, by C. H. Connett, petitioner, for whom D. L. Severn was substituted as administrator, following petitioner's death, against Pearl N. Church, contestant. From an order denying contestant's petition for issuance of letters of administration to her, and granting letters to the petitioner, the contestant appeals.

Affirmed.

Benjamin W. Shipman, of Los Angeles, for appellant.

J. K. Reeder and Forgy, Reinhaus & Forgy and R. M. Crookshank, all of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order appointing the respondent administrator of the estate of Richard E. Frary, deceased. After the appeal was taken the respondent died and D. L. Severn was appointed administrator of this estate and has been substituted as respondent herein.

Richard E. Frary died intestate, leaving no issue. The original respondent, as the nominee of a sister of the deceased, applied for letters of administration. The appellant, who is a daughter of decedent's predeceased wife, filed a contest and also a petition that letters be issued to her. Her petition was denied, letters were issued to the original respondent and she has appealed.

The main property in this estate consists of a parcel of real property in this state which was taken in the name of

Richard E. Frary and Emma C. Frary, his wife, as joint tenants with the right of survivorship. It is conceded that this property was acquired with the proceeds of the earnings of these parties after marriage and while residing in Oklahoma. They came to California some ten years before Mr. Frary died, which event occurred about a year after the death of Mrs. Frary.

The appellant contends that the respondent is not entitled to letters in this estate because all of this property goes to the children of the predeceased wife under section 229 of the Probate Code. It is argued that the funds brought to California by this husband and wife, having been earned by them in Oklahoma, were not community property; that the creation of the joint tenancy in the real property purchased with these funds created a separate estate in each spouse; that the estate of each spouse was created at the time of the grant to them in joint tenancy; that since the estate of the surviving husband dates back to the creation of the joint tenancy he acquired the entire property as a gift from his wife, the gift to take place in futuro; and that section 229 of the Probate Code is therefore controlling.

[1] The court found "that the property was the community property of Emma C. Frary and Richard E. Frary prior to the date when the said property was acquired" by them as joint tenants. While this finding is erroneous (see In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343), this error is immaterial here.

[2] This wife had some interest in the funds thus earned during this marriage and the husband also had an interest therein. Whatever these interests were at the time these funds were brought to California, they were the separate property of the spouses, respectively, and the interest of each spouse was his or her separate property after the creation of this joint tenancy. Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27. It would seem that the separate property held by each of these parties after the creation of the joint tenancy, being the interest of each as a joint tenant, was acquired by each not as a gift from the other but as a direct result of a contractual relationship. By a mutual binding agreement each spouse contributed his or her interest in funds earned after marriage toward the purchase of property which was taken in both their names as joint tenants. Had these funds been earned in this state they would have been community property and the survivor of these joint tenants would have taken the entire property by right of survivorship and upon his death his heirs alone would be entitled to share therein. In re Kessler, 217 Cal. 32, 17 P.2d 117.

[3-5] No good reason appears why a similar result should not obtain here even though the respective interests of the spouses in the funds brought to this state must be regarded as their separate property. While the transfer of separate property into a joint tenancy status may often constitute a gift inter vivos (see Bell v. Moloney, 175 Cal. 366, 165 P. 917; George v. Daly, 83 Cal.App. 684, 257 P. 171; Tilden v. Tilden, 81 Cal.App. 535, 254 P. 310), this is not necessarily the case where a husband and wife use that form of contract to transfer or change their respective interests in property earned during the marriage into a joint tenancy. In a very real sense the parties in such a case are not making a gift to each other but each is retaining an interest which is separate property and which may ripen into the absolute ownership of all of the property if he survive the other. We think that such a situation should not be held to constitute a gift within the meaning of section 229 of the Probate Code, but it is rather a contractual change in the status of the property and in the rights of the parties. Not only is this change brought about by contract, each of the parties contributing an interest in property theretofore held by him, but the resulting condition permits both parties to retain the equal enjoyment of the entire property during their joint lives, and then leaves the property to whichever one may survive the other. In Re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873, 878, the court said: "It cannot be said, we think, that if a husband and wife enter into a mutual binding agreement whereby each contributes his and her separate property to a joint tenancy account, that the converting of said separate property of each of the spouses into a joint tenancy ownership constituted a gift by each to the other of his or her separate property." We are unable to see why a different situation should result where a husband and wife used their joint earnings to

purchase real property which was taken by them in joint tenancy.

[6] A further consideration here is that even if it could be said that a part of the property in question came to the deceased husband as a gift from his wife through the creation of the joint tenancy it would still be true that another part of that property came to him as a result of what he himself had put into the joint tenancy, which part at least would not be a gift to him from his wife. See In re Estate of Harris, supra. In any event, the relatives of the decedent are entitled to succeed to some portion of this property and under sections 422 and 423 of the Probate Code the order appealed from was correctly entered.

The order is affirmed.

I concur: JENNINGS, J.

MARKS, Justice (concurring).

I concur.

I concur in the foregoing opinion and judgment. In addition to what is said in the main opinion, I wish to stress the case of In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27, 28.

In that case Elizabeth D. Putnam inherited property from Timothy Halstead, her first husband. She subsequently married J. F. Putnam. She sold some of the inherited property and invested the proceeds in corporate stock that was issued in the names of Elizabeth D. Putnam and J. F. Putnam as joint tenants with the right of survivorship. After several years the certificates of stock were assigned in writing by Elizabeth D. Putnam and J. F. Putnam to Elizabeth D. Putnam. New certificates were issued to her and title remained in her until her death. She died intestate.

Arzena Halstead, the daughter of Timothy Halstead, and stepdaughter of Elizabeth D. Putnam, laid claim to the stock under the provisions of section 229 of the Probate Code, claiming that the property from the proceeds of which the stock was purchased came to Elizabeth D. Putnam by descent, devise, or bequest from Timothy Halstead, her first husband; that those funds were traceable into the stock which therefore should be returned to the family of the first owner.

In holding against this contention and that the title to the stock did not originate in Timothy Halstead but in the joint tenancy estate, the Supreme Court said: "The real question in the case has never been precisely decided in this state. We may for the purpose of focusing attention upon the controlling factors phrase it in this way. Did the creation of the joint tenancy and its subsequent termination by the conveyance of the entire estate therein to decedent operate to alter the status of the property or change the origin of the title by which Elizabeth D. Putnam owned the stock at the time of her death? The court below, after reciting the details of the transaction which we have heretofore summarized, found as follows: * * * 'That said shares of stock did not, nor did any portion thereof, come to said Elizabeth D. Putnam from her predeceased spouse Timothy Halstead by gift, descent, devise, or bequest, but all thereof came to said Elizabeth D. Putnam by the voluntary act of said J. F. Putnam.' The reason and purpose of section 229 of the Probate Code is, in the absence of testamentary disposition, to turn the property back to the family from which it came, rather than to permit it to descend to the wife's family. In other words, the section was designed to benefit the natural objects of the bounty of the former owner. Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A.L.R. 1318. But the section never sought to limit the right of the wife to dispose of it by will or conveyance. For which reasons we find the authorities declaring that property so inherited does not lose its character or status as such by a mere change in form or identity, such, for example, as the exchange of inherited parcel A for parcel B. The latter property acquires the status of that formerly possessed by parcel A. Estate of Brady, 171 Cal. 1, 151 P. 275, and cases there cited. Thus it follows that, if when the stock was originally purchased and the joint tenancy created, J. F. Putnam conveyed to his wife property in exchange for his joint tenancy interest, the property so conveyed by him would be subject to distribution under section 229. Also, although the creation of the joint tenancy were without valuable consideration moving to Elizabeth D. Putnam, yet she had effectively removed the property from the status it had formerly held. Estate of Brady, supra. It is obvious that had the joint tenancy continued until her death, J. F. Putnam would, by reason of his right of survivorship, have owned the property outright. That which is the subject of this contest would have been his, as a matter of right. Hence the reason and purpose of section 229 is not applicable."

From the decision in the Putnam Case it would seem to follow that the creation of a joint tenancy breaks the continuity of the chain of title to the property of a predeceased spouse which destroys the applicability of section 229 of the Probate Code. If that is true, then the heirs of Richard E. Frary would be entitled to administer his estate because his title to the property came to him by operation of law from the joint tenancy estate and not "by gift, descent, devise or bequest" (sec. 229, Probate Code) from his deceased wife.

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25 Cal.App.2d 717

PEOPLE v. TULARE PACKING CO. et al.

Civ. 1855.

District Court of Appeal, Fourth District, California.

April 14, 1938.

Rehearing Denied May 11, 1938.

1. Evidence 🔑48

The reviewing court could take judicial notice of contents of certified copy of a map of portion of railroad's roadbed, original of which was on file in the General Land Office, even though map could not become part of the formal record because never made part of record in trial court.

2. Public lands 🔑71

A railroad acquired limited fee title on implied condition of reverter, when it filed location map of right of way, and did not acquire fee-simple title to same lands by subsequently obtaining patents under statute governing grant of fee-simple title to alternate sections. Act Cong. July 27, 1866, §§ 2, 3, 18, 14 U.S.Stat. pp. 294, 299.

3. Public lands 🔑71

Where railroad obtained fee-simple title to public lands under statute governing grant of alternate sections, railroad's subsequent use of such lands for railroad shops did not reduce title to a limited fee on implied condition of reverter in event of nonuse for railroad purposes. Act Cong. July 27, 1866, §§ 2, 3, 18, 14 U.S.Stat. pp. 294, 299.

4. Eminent domain 🔑147

In action to condemn railroad's land for highway purposes, railroad was not entitled to market value of land to which railroad held only a limited fee title, subject to reverter in event of nonuse for railroad purposes, but only to damages caused by decrease in value of use for railroad purposes resulting from use for highway purposes. Act Cong. July 27, 1866, §§ 2, 3, 18, 14 U.S. Stat. pp. 294, 299.

5. Pleading 🔑93(2)

In action to condemn railroad's land for highway purposes, allegation in railroad's answer that land was part of right of way and station grounds, and that title was acquired under statute construed as giving only limited fee, did not preclude railroad from claiming that railroad held title in fee simple, as alleged elsewhere in the answer, under rule permitting inconsistent defenses.

6. Pleading 🔑93(1)

Though every defense must be consistent in itself, a defendant may plead inconsistent defenses and offer evidence in support thereof.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the People of the State of California, acting by and through the Department of Public Works, against the Tulare Packing Company and others, to condemn land for highway purposes, wherein cases were tried separately. From a judgment condemning the land of defendant Southern Pacific Railroad Company, plaintiff appeals.

Reversed and remanded, with directions.

Clarence W. Morris, Lincoln V. Johnson, Holoway Jones, and George C. Hadley, all of San Francisco, for the People.

McFadzean & Crowe, of Visalia, for respondent.

MARKS, Justice.

This is an action wherein plaintiff sought to condemn for highway purposes two parcels of respondent's property in the city of Tulare. Interests of the defendants were also sought to be condemned. Their cases were evidently tried separately. Hereafter we will refer to the Southern

Pacific Railroad Company as the defendant.

The pleadings, findings, and judgment designated the tracts of land of defendant to be taken for public use, as "parcel No. 1, first," and "parcel No. 1, second." We will use these designations in this opinion. The trial court fixed the value of parcel No. 1, first, at $8,000, and the value of parcel No. 1, second, at $2,500. No severance damages were allowed. Judgment was entered accordingly and plaintiff has appealed.

The case presents features new to the courts of California. Its decision rests on the source of defendant's title to the parcels and the exact title that it holds. Plaintiff insists that defendant gained title through section 2 (and section 18) of an act of Congress approved July 27, 1866, 14 U.S.Stat. 292, 294, 299, and has something in the nature of an easement giving it the right of use only. Defendant maintains with equal confidence that it acquired title under sections 3 and 18 of the act and holds the property in fee simple.

On this question the trial court found as follows: "That it is true that the defendant, Southern Pacific Railroad Company, is the owner in fee simple, and by itself and its Lessee Southern Pacific Company, entitled to and prior to the commencement of this action was in the possession of said lands under a patent from the United States of America, dated March 13, 1874, and recorded in the office of the County Recorder of the County of Tulare, State of California, on June 27th, 1874, in Liber E of Land Patents, at page 531, 532 and 533; and that it is also true that the defendant Southern Pacific Railroad Company is the owner in fee, and by itself and its lessee, Southern Pacific Company, entitled to and prior to the commencement of this action was in the possession of said lands under an Act of Congress approved July 27, 1866, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and Arkansas to the Pacific Coast' (14 Stats. 292); and that it is true that said lands are a part of said right of way and station reservation at Tulare, California; and that at the time of the commencement of this action and for many years prior thereto said lands have been and were in constant use by said defendant, by and through its said lessee as a common carrier of freight and passengers in a regular interstate and intrastate standard guage railroad business."

Section 2 of the act in question provides in part as follows: "And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States."

The pertinent provisions of section 3 of the act are as follows: "And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office."

Section 18 of the act provides as follows: "And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

It is intimated in some federal cases that a railroad company acquiring title to its right of way in limited fee, under the various railroad aid acts of Congress, cannot alienate a lateral portion of such right of way for highway purposes without the consent of the federal government. Such consent has been given to an acquisition for highway purposes such as we have before us. Act of Congress, approved May 25, 1920, 41 U.S.Stat. 621, 43 U.S.C.A. § 913; Act of Congress, approved Nov. 9, 1921, 42 U.S.Stat. 212, 216, 23 U.S.C.A. § 17.

[1] We shall have occasion to refer briefly to a certified copy of a map of a portion of defendant's roadbed southerly from Goshen Junction, through the city of Tulare, in Tulare county. The original is on file in the General Land Office in Washington, D. C. This court denied plaintiff's motion for diminution of the record by the addition of this certified copy of the map (People v. Southern Pacific Railroad Company, Cal.App., 72 P.2d 254), for the reason that it was never made a part of the record in the trial court. However, we are permitted to take judicial notice of its contents (Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175), even though we could not permit it to become a part of the formal record.

This map was prepared in 1872. We cannot determine the exact date it was filed in the Land Office. The patent to sections 3 and 11 in township 20 south, range 24 east, Mt. Diablo Base and Meridian, in Tulare county, conveying that property to the defendant, was executed on March 13, 1874. All of parcel No. 1 first is in section 11 and the majority of parcel No. 1 second is in section 3. A small triangular shaped piece of parcel No. 1 second is in section 2, in the same township, range, and county. Defendant proved no title to this last-mentioned land unless it acquired it under sections 2 and 18 of the act of Congress approved July 27, 1866.

It is not questioned that defendant completed the construction of its railroad through Tulare. It probably filed its location map in 1872. The railroad ran through sections 3 and 11 to which defendant received its patent in 1874. The grant to its right of way and station grounds, by virtue of the act of Congress, therefore antedated its patent to the odd-numbered sections.

[2] An almost exactly similar factual situation is found in the case of H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co., 9 Cir., 214 F. 920, 923. The Northern Pacific Railway Company constructed its railroad under the provisions of the Northern Pacific Land Grant Act of July 2, 1864, 13 U.S.Stat. 365, 367. Sections 2 and 3 of that act are practically identical with the same numbered sections of the act of July 27, 1866, except that the Northern Pacific Railway Company was given a right of way 400 feet wide, and defendant here was given a right of way 200 feet wide. The railroad ran through section 17, to which the railway company subsequently received a patent. One of the important questions decided in that case is whether the right of way was held under section 2 of the act of Congress in an estate less than fee, or under the patent in fee. In holding that the title to the right of way was held under section 2 of the act of Congress in an estate less than fee (the court calls it an easement) and not in fee under the patent, the court said:

"Our first inquiry relates to the nature of the railroad company's estate. If title vested in it by operation of section 3 of the grant, there is no room for controversy touching the extent of its rights, for upon that assumption it became clothed with full power of disposition, such as is ordinarily incident to unrestricted private ownership. But a different case is presented if the strip constitutes a part of the right of way granted by section 2. Lands falling within this provision are acquired upon the implied condition that they be used for railroad purposes, and the rights conferred are limited to such use. Generally speaking, it is not within the power of the grantee to defeat the designated purpose of the grant by a voluntary alienation of title, or by abandoning possession to an adverse claimant. * * *

"That Railroad street is part of the right of way so acquired, we entertain no doubt.

Physically it is embraced within the boundaries thereof; the grant was in præsenti, and was given precision by the filing of the map of definite location; the construction of the road was not a condition precedent to the transfer of title, but title passed upon the selection of a definite route, attended with notice to the government of such selection, through the filing of the map of definite location. N. P. R. Co. v. Murray, 9 Cir., 87 F. 648, 31 C.C.A. 183; Sioux City & I. F. Town-Lot & Land Co. v. Griffey, 143 U.S. 32, 12 S.Ct. 362, 36 L.Ed. 64; Tarpey v. Madsen, 178 U.S. 215, 20 S.Ct. 849, 44 L.Ed. 1042; Missouri, K. & T. R. Co. v. Cook, 163 U.S. 491, 16 S.Ct. 1093, 41 L.Ed. 239; Kansas Pac. Railroad Co. v. Dunmeyer, 113 U.S. 629, 5 S.Ct. 566, 28 L. Ed. 1122; Van Wyck v. Knevals, 106 U.S. 360, 1 S.Ct. 336, 27 L.Ed. 201; St. Joseph & D. C. Railroad Co. v. Baldwin, 103 U.S. 426, 26 L.Ed. 578. There is nothing to the contrary in Jamestown, etc., R. Co. v. Jones, 177 U.S. 125, 20 S.Ct. 568, 44 L.Ed. 698, or Stuart v. U. P. R. Co., 227 U.S. 342, 33 S. Ct. 338, 57 L.Ed. 535, or N. P. R. Co. v. Smith, 171 U.S. 260, 18 S.Ct. 794, 43 L.Ed. 157. In the first and second of these cases it was decided only that the definite location of a route may, not must, be made by the actual construction of the road. In the Smith Case it was apparently the opinion of the court that the filing of the map of definite location did not necessarily exhaust the railroad company's power of selection, and that, under the circumstances there shown, it acquired a right of way along the line of the road as actually constructed, even though such line deviated from that exhibited upon the maps. But if we assume that in the absence of intervening private rights the railroad company might, with the approbation of the administrative officers of the government, change its route and make an effective selection of a new right of way by the construction of its road, without amending its map or filing a new one, it does not follow that the filing of the map of definite location is ineffective or fails to consummate the grant. If it be objected that the act provides for only one right of way, and the company cannot hold two, the answer is that a title acquired either by the filing of a map or the construction of the road reverts to the United States in case of abandonment, or of forfeiture through nonuser, and that therefore, where, as in the Smith Case, the right of way shown upon the map of definite location is not occupied by the road as actually constructed, it is to be deemed to have been abandoned and the title thereto lost. In the present case the route was never changed, and it is therefore held that title to the right of way 200 feet on either side of the center line of the railroad track, and including the strip in controversy, passed to the railroad company on October 4, 1880, the date its map was filed in the General Land Office.

"We are unable to accept the view that, because the right of way at this place is in an odd-numbered section, the railroad company took the absolute title, unlimited by the implied condition of reverter attending the right of way grant. No substantial reason has been assigned, and clearly there is none, for assuming that Congress intended such an artificial and whimsical distinction. A strip of land 400 feet wide through the public domain was being withdrawn from private entry and dedicated as a right of way for a transcontinental railroad. The value of a right of way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the government would get back only numerous disconnected fragments of that which it was granting as a continuous line. There is little weight in the suggestion that Congress could not have intended a uniform status for the entire right of way, because it doubtless knew that any route which might be selected would here and there traverse private holdings, and that therefore the continuity of the grant would be broken. True, absolute continuity was not to be expected, but when we consider the vast stretch of public domain over which the road would pass, and the rarity and insignificance of the private holdings, it may readily be concluded that these interruptions were thought to be negligible, as affecting the value of the right of way as a whole.

"In support of their position, appellants invoke the general rule that, where two titles relate back to the same point of time, there is a merger, and the greater title prevails from the beginning. It is conceded, however, that this doctrine, if the appellants' application of it be correct, would here come into conflict with the controlling principle that the granting act must be construed in such a manner as to give effect to the legislative intent, provided it be found that Congress intended that the right of way throughout should be held subject to the conditions and limitations declared in the Townsend Case [N. P. R. Co. v. Townsend, 190 U.S. 267, 23 S.Ct. 671, 47 L.Ed. 1044]. Such, we have no hesitation in finding, was the intent of Congress, and therefore, it is not deemed necessary to consider the correctness of the assumptions upon which appellants' application of the rule necessarily rests, namely, that, as the terms are used in the learning upon the law of merger, the estate of the grant-in-aid is greater than that of the right of way grant, and that they both date from the same point of time." See, also, Southern Pacific Co. v. City of Reno, D.C., 257 F. 450; Mercantile Trust Co. v. Atlantic & Pacific R. Co., C.C., 63 F. 910.

The nature of the title to a railroad right of way acquired under section 2 of the act of Congress of July 2, 1864, supra, was before the Supreme Court of the United States in the case of Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 23 S.Ct. 671, 672, 47 L.Ed. 1044, where it was said:

"Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U.S. 171, 181, 19 S.Ct. 128, 43 L.Ed. 407, 410; St. Joseph & Denver C. R. Co. v. Baldwin, 103 U.S. 426, 26 L.Ed. 578), it must be held that the fee passed by the grant made in § 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin Case) 'to those necessarily implied, such as that the road shall be * * * used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." See, also, Territory of New Mexico v. U. S. Trust Co., 172 U.S. 171, 19 S.Ct. 128, 43 L.Ed. 407.

From the foregoing authorities we conclude that defendant acquired title to its right of way and station grounds in the city of Tulare under section 2 of the act of Congress of July 27, 1866; that its title was of "limited fee, made on an implied condition of reverter"; that the subsequent patent to the two odd-numbered sections added nothing to the estate it held in the right of way and station grounds. In other words, the effect of the patent would have been the same had it expressly reserved the right of way and station grounds, or so much of them as were in the two sections, from the property granted. It is also clear that the land described in the patent, not within the right of way and station grounds, was held by defendant in fee simple with all the rights of private ownership.

It is clear that the same property cannot be held in fee simple and in limited fee by the same owner at the same time. The right of way and station grounds were held under the congressional grant contained in section 2 of the act of July 27, 1866. The balance of the odd-numbered sections was held in fee simple under the patent. It follows that the finding which we have quoted, numbered "IV," and which in effect finds that both of the properties are held by defendant under the patent and also under the congressional grant, cannot be supported. The finding is inconsistent, conflicting, and contrary to law.

About the only evidence in the record concerning the boundaries of the station grounds was given by a witness for defendant, who testified as follows:

"Q. In other words, through the city of Tulare the station reservation is 400 feet in width? A. 440 feet in width.

"Q. 440 feet in width, and immediately south of the city limits of Tulare, it narrows down to 100 feet? A. Yes, 100 feet in fence, yes.

"Q. 100 feet in fence. Yes.

"The Court: Well, is the station reservation entirely through the city 440 feet? A. Yes, sir, that is correct, from the north line of the southeast quarter of section three to * * *

"The Court: It is not 440 feet here, is it? (Showing.) A. Yes, from the west line of 'J' Street to the east line of 'I' Street, 440 feet in width.

"Mr. Crowe: Q. So that this area here at the north end of town is the same as the area at the south and is the same through the heart of town, but is not shown on this map? A. That is correct.

"Q. That does narrow down just a little bit when you get past Bush Street on the north? A. Previously an easement had been granted for highway purposes through there.

"Q. Out of the 440 feet? A. Out of the 440 feet.

"Q. And now this action seeks to take an additional 20 feet? A. 20 feet, plus a triangle on which would be the north line of Bush Street, into the west line of 'J' Street."

From the foregoing, and from the maps before us, it appears that the station grounds in the city of Tulare extend in a general northwesterly direction from the southern to the northern city limits; that such grounds were 440 feet in width and are bounded on the east by the west line of "J" street and on the west by the east line of "I" street.

The maps introduced by both parties show that all of parcel No. 1 first is outside of the station grounds, and all of parcel No. 1 second is within those grounds. From what we have already said, it follows that all of parcel No. 1 first was owned in fee by defendant, and all of parcel No. 1 second was owned in limited fee with an implied condition of reverter.

The only statement in the record in any manner conflicting with this conclusion is the following:

"The Court: Well, let the objection be overruled. This property, however, was once used, was it, for railroad purposes?

"Mr. Crowe: There is no evidence of that in the record, if the Court please.

"The Court: Well, I am asking the question. Wasn't this property once used for shops? A. Many years ago it was, yes." (Referring to parcel No. 1 first.)

[3] It should be observed that the statement is very indefinite as to the time the property was used for shops, presumably railroad shops. The case was tried in June, 1936. "Many years ago" might have referred to a date forty or even fifty or more years before that date. When we refer to the certified copy of the map of 1872 from the United States Land Office, which plaintiff produced and asked us to consider, we find that the improvements on the station grounds are set forth in considerable detail. We find no reference to any shops, or railroad shops. This map was the foundation of defendant's title to its station grounds to which it acquired title, in limited fee with an implied covenant of reverter. Record title in fee to the balance of the odd-numbered sections was acquired under the patent. If defendant subsequently used a portion of the property it owned in fee for railroad shops, such use would not affect its fee title to the land so used. The grant in the patent was absolute in so far as the questions here presented are concerned. A fee title once vested could not be reduced to a limited fee by a subsequent user. The patent did not so provide.

The trial court found that the reasonable market value of the property taken by the improvement described as parcel No. 1 first was $8,000. This finding is supported by evidence and need not be disturbed, as that property was owned in fee simple by defendant.

[4] A different situation exists as to parcel No. 1 second. The trial court found that the reasonable market value of this property was $2,500 and awarded that sum for that property taken by the public improvement. The court used the wrong measure in fixing the compensation to be paid defendant for the property in parcel No. 1 second, as defendant did not own that property in fee and it was only entitled to compensation for the damage which the use of the property taken by plaintiff would cause to the right of use by defendant. This question was before the court in City of Los Angeles v. Allen, 32 Cal.App. 553, 163 P. 697, 701, where it was said:

"There is an important difference between the extension of a street crossing over a railroad track and a taking for the purpose of constructing a street longitudinally covering a right of way. 'The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together.' Elliott on Railroads, 2d Ed., § 1098. See, also, Elliott on Roads and Streets, 3d Ed., § 249; Pierce on Railroads, p. 193. It has been held that when a railroad corporation owns only an easement in the land which it occupies, the imposition of another easement on the same land wholly consistent with the complete and undisturbed enjoyment of the original use is not a taking of property, and that if there is an interference with the original use, there is a taking only to the extent of such interference. The corporation having the original right is not, when the land is occupied concurrently by another corporation, entitled to recover the value of the land as measured by the most advantageous use to which it could be put. The true measure of damages in each case is the decrease in the value of the use of the land for the first purpose by reason of its being concurrently used for the second purpose. 10 R.C.L., title Eminent Domain, § 129, and cases there cited. * * *

"We concede that a public service corporation is peculiarly subject to regulation under the police power, and that the action of the city authorities or of state authorities in compelling the defendant railroad company, at its own expense, to alter its railroad structures at any time when the continued maintenance of such structures endangers the public safety will not be a taking of the property in the constitutional sense. But this furnishes no adequate reason why the city in condemning this right of way and applying it to street uses concurrently with the railroad use should not pay for any diminution in value of the railroad company's reserved rights of use in the property, to the extent that such diminution in value can now be shown to be actually involved as a consequence resulting from the process of subjecting the land to street uses. That it is the purpose and policy of the state of California to allow this just compensation, is indicated by the language of section 1240, Code of Civil Procedure, to which we have referred, wherein it is provided that in subjecting property to such concurrent use the court may fix the terms and conditions upon which the property may be so taken. The fixing of those terms and conditions is evidently intended to include the allowance of compensation for the diminution in value to which we have referred."

It follows that the portion of the findings which fixed the market value of $2,500 for the taking of parcel No. 1 second cannot be sustained. The case must be retried as to that question, evidence based on the proper measure of damage as to that parcel must be received, proper additional findings must be made as to that damage, and judgment to include the award already made for parcel No. 1 first must be entered accordingly.

[5] To escape the foregoing conclusion as to parcel No. 1 first, and to secure a general reversal of the judgment and a retrial of all the issues, plaintiff calls our attention to that portion of the answer which pleads defendant's title to both parcels as acquired under section 18 (and section 2) of the act of Congress of July 27, 1866, and that both parcels are part of its right of way and station grounds. It urges that, with this admission in its answer, defendant cannot assert any greater title to either parcel than it acquired under sections 2 and 18 of the act of Congress. While there is such an allegation in the answer, there is also an allegation that defendant held title to both parcels in fee simple.

[6] There is no rule of pleading more firmly established than the one permitting a defendant to set up inconsistent defenses. In 21 California Jurisprudence 134, it is said:

"While each defense must be consistent in itself, especially when the pleadings are verified, it is settled that a defendant may set up in his answer defenses which are inconsistent, one with the other, and may offer evidence in support thereof. The rule is the same although the pleadings are verified. A defendant does not waive his rights under one defense by pleading another and inconsistent defense, nor may a defense be disregarded merely because it is inconsistent with some other defense pleaded, since denials, admissions, or allegations in one defense remain unaffected by matter inconsistent therewith in a separate defense. Thus the answer may, in a special defense, admit an allegation previously denied without destroying the effect of the denial, as such admission relates only to the defense in which it is set forth. Likewise, a denial in one defense is not affected or waived by setting up inconsistent affirmative matter in another. The rule that the averment which bears most strongly against the pleader is to be taken as true may not be applied to repugnancy between inconsistent defenses."

It is therefore ordered: (1) That finding No. 4, heretofore quoted, be stricken from the findings of fact and in lieu thereof the following finding of fact substituted:

"That it is true that the defendant, Southern Pacific Railroad Company, is the owner in fee simple, and by itself and through its lessee, Southern Pacific Company, prior to the commencement of this action, was entitled to and was in possession of the lands described in the pleadings as 'parcel No. 1 first', under a patent from the United States of America dated March 13, 1874, and recorded in the office of the County Recorder of the County of Tulare, State of California, on June 27, 1874, in Liber E of Land Patents at pages 531, 532, and 533; that it is not true that said 'parcel No. 1 first' is or ever has been a part of the right of way or station grounds of defendant or of its lessee. It is true that defendant, Southern Pacific Railroad Company, is the owner in limited fee with a condition of reverter, and by itself and through its lessee, Southern Pacific Company, prior to the commencement of this action, was entitled to and was in possession of the lands described in the pleadings as 'parcel No. 1 second' under a grant from the United States of America as appears in sections two and eighteen of an Act of Congress approved July 27, 1866, and published in volume 14 of the United States Statutes at page 292 et seq., entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast'; that it is true that said parcel No. 1 second was, at the time of the commencement of this action, and always has been, a part of the station grounds of defendant and its said lessee, and was so used; that it is not true that defendant owned said parcel No. 1 second in fee simple or in a greater estate than it received under said sections of said Act of Congress."

(2) The following is stricken from finding of fact No. VIII: "And that it is true that the reasonable market value of Parcel No. 1 (Second) of said lands, hereinafter particularly described, is Two Thousand Five Hundred Dollars ($2500.00)."

(3) The judgment is reversed, with directions to the trial court to:

(a) Retry the issue of the loss or damage occasioned by the taking of the land described in the pleadings as parcel No. 1 second from the station grounds of defendant.

(b) Amend the findings of fact by making a finding of the amount of such loss or damage.

(c) Amend the conclusions of law in accordance with the facts found in such amended findings of fact.

(d) Enter judgment in accordance with such amended findings of fact and conclusions of law.

We concur: BARNARD, P. J.; JENNINGS, J.

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26 Cal.App.2d 1

PEOPLE v. GILBERT et al.

Cr. 2975.

District Court of Appeal, Second District, Division 1, California.

April 18, 1938.

As Modified on Denial of Rehearing May 2, 1938.

Hearing Denied by Supreme Court May 16, 1938.

1. Indictment and Information 🔑15(5)

Where demurrer and pleas have been entered to indictment, but no ruling has been made on demurrer, same grand jury may return second indictment without hearing additional evidence.

2. Indictment and Information 🔑16

Resubmitting charges to grand jury without court's direction is barred only where demurrer to first indictment is sustained.

3. Indictment and Information 🔑125(5½)

That count charging conspiracy alleged object of conspiracy to be commission of three separate and distinct crimes, violating separate sections of Penal Code, did not make count improper as charging more than one offense. Pen.Code, §§ 115, 182, subd. 4, 476a, 531, 952, 1099.

4. Indictment and Information 🔑125(5½)

A conspiracy to commit any or all of acts enumerated in statute defining conspiracy amounts to a single offense only and may be charged as a single offense in indictment. Pen.Code, §§ 182, 954.

5. Indictment and Information 🔑71

An indictment for conspiracy alleging that defendants "caused" third party to make conveyances and issue checks, and alleging other overt acts, complied with statute requiring statement of acts constituting the offense in ordinary and concise language. Pen.Code, § 950.

> The word "cause" means to be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make, create, produce, occasion, originate, induce.
>
> [Ed. Note.—For other definitions of "Cause," see Words & Phrases.]

6. Indictment and Information 🔑93

The purpose of an indictment or information is to inform accused of the offense with which he is charged, but not of the particular circumstances thereof, which are furnished by transcript of testimony upon which indictment or information was founded. Pen.Code, §§ 870, 950–952; § 925, as amended by St.1933, p. 2021; § 959, as amended by St.1935, p. 859.

7. Statutes ⇐225

The statutory requirements that indictment describe offense committed must be construed in conjunction with statutes specifying form of indictment. Pen.Code, §§ 950–952; § 959, as amended by St.1935, p. 859.

8. Forgery ⇐31

A count charging recording of false instrument, which specifically notified defendants of alleged falsity of the instrument, was not demurrable as not showing wherein instrument was false, when transcript of testimony upon which indictment was founded fully showed details upon which alleged falsity was predicated. Pen.Code, §§ 115, 954.

9. Conspiracy ⇐47

False pretenses ⇐49(1)

Evidence *held* to authorize conviction of husband and wife for conspiracy to commit grand theft, to issue of bank check with intent to defraud, and to record false instrument; of conspiracy to participate in fraudulent conveyance; and of conspiracy to defraud or obtain property by false pretenses or false promises. Pen.Code, §§ 115, 182, 476a, 531.

10. Forgery ⇐44

Evidence *held* to authorize conviction of recording false instrument. Pen.Code, § 115.

11. Criminal law ⇐260(11)

Where there is substantial evidence tending to support verdict or decision of trial judge sitting without a jury, reviewing court cannot substitute its judgment on facts for that of trial judge, and may disturb judge's finding only where there was no substantial evidence to support it as a matter of law.

12. Criminal law ⇐254

Where jury is waived, trial court must determine what facts are established by the evidence, both as trier of the facts and upon motion for new trial after the decision.

13. Criminal law ⇐354

In prosecution for conspiracy to defraud by forgery, fraudulent conveyances, and other devices, court need not find that victim of conspiracy was insane or incompetent, but could consider victim's mental capacity in determining defendants' intentions and their honesty in handling victim's money and property. Pen.Code, §§ 115, 182, 476a, 531.

14. Criminal law ⇐260(11)

The reviewing court is bound by findings of trial judge sitting without jury on a point on which evidence was in conflict.

15. Witnesses ⇐198(2)

In prosecution for conspiracy, testimony of attorney who had represented victim, concerning victim's mental condition, was not inadmissible as confidential and privileged, where it did not divulge communications between attorney and client and was not based on such communications.

16. Criminal law ⇐878(3)

In prosecution for substantive offenses and for conspiracy to commit such offenses, dismissal of counts charging substantive offenses and acquittal on other count charging substantive offense did not operate as acquittal under conspiracy counts, where conspiracy counts alleged other overt acts in addition to acts constituting substantive offenses, even though some of such overt acts were not in themselves criminal. Penal Code, §§ 182, 184.

17. Criminal law ⇐878(3)

An acquittal of substantive offense operates as acquittal of conspiracy to commit such offense only where substantive offense is alleged as a single entity to be the only overt act committed in furtherance of conspiracy, or where acquittal of substantive offense amounts to a finding that none of the overt acts charged as part of the conspiracy were committed. Penal Code, §§ 182, 184.

18. Criminal law ⇐878(3)

Where such portion of counts charging conspiracy as remains unadjudicated by acquittal on counts charging substantive offenses is sufficient to constitute criminal conspiracy, conviction of conspiracy will stand, notwithstanding acquittal of substantive offenses. Penal Code, §§ 182, 184.

19. Conspiracy ⇐27

Acts done and performed in preparation for carrying out conspiracy, though innocent in themselves, are nevertheless "overt acts" within statutes governing conspiracy. Pen.Code, §§ 182, 184.

[Ed. Note.—For other definitions of "Overt Act," see Words & Phrases.]

20. Conspiracy ⇐27

Causing checks payable to victim of conspiracy to be issued, with intent to defraud victim of conspiracy and bank, constituted "overt acts" within terms of statutes governing conspiracy, irrespective of whether checks were issued without sufficient funds, as was alleged in counts charging issuance of checks as a substantive offense. Pen.Code, §§ 182, 184, 476a.

21. Criminal law ⇨1169(2)

In prosecution for participating in fraudulent conveyance, that Court of Appeal reversed judgment introduced in evidence to show validity of claim of creditor defrauded by conveyance, on ground of failure to instruct on applicable legal principles, without passing on validity of creditor's claim, was immaterial to determination of appeal from conviction where evidence was conflicting but warranted finding that creditor's claim was valid and just. Pen.Code, § 531.

22. Criminal law ⇨508(6)

In prosecution for conspiracy, discharge of all but two defendants, ordered pursuant to statute in order that defendants might be called as witnesses, did not preclude treating such discharged defendants as coconspirators as respects remaining defendants. Pen.Code, §§ 1099, 1101.

23. Conspiracy ⇨23

In prosecutions for conspiracy, conspiracy must be proved, but it is not essential to conviction of conspirators that another or all of coconspirators be tried and convicted. Pen.Code, §§ 182, 184.

24. Conspiracy ⇨23

Where discharge of an alleged conspirator is not inconsistent with his guilt, but merely bars subsequent prosecution, such discharge does not invalidate conviction of his coconspirators. Pen.Code, §§ 1099, 1101.

25. Husband and wife ⇨107

Where husband and wife joined with third persons in conspiracy, the common-law rule that husband and wife are but one person does not preclude conviction of husband and wife for conspiracy, even though third persons are discharged from prosecution. Penal Code, §§ 182, 184.

26. Criminal law ⇨1023(8)

An order denying motion in arrest of judgment is not appealable.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Lois Preston Gilbert, Irving M. Gilbert, and others were charged with an offense, named defendants were convicted of conspiracy and of recording a false instrument, and they appeal.

Affirmed, and purported appeal from order denying motion in arrest of judgment dismissed.

Hill, Morgan & Bledsoe, Benjamin F. Bledsoe, and Charles P. McCarthy, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and J. Miller Leavy, Deputy Dist. Atty., both of Los Angeles, for the People.

WHITE, Justice.

On July 3, 1936, an indictment against the above-named appellants, as well as defendants Cleo Bond Baylis and Ernest M. Baylis, was returned by the grand jury of Los Angeles county. The indictment contained three separate charges of conspiracy in counts I, VI, and VII, while count II charged grand theft, and counts III and IV alleged a violation of section 476a of the Penal Code. In count V the defendants were accused of a violation of section 115 of the Penal Code. On July 13, 1936, a demurrer to the indictment was interposed by all the defendants. On July 15, 1936, and before a ruling was had on the demurrer, an amended indictment was returned and filed by the grand jury, containing the same charges as in the original indictment, but amplifying the language and more completely and clearly charging the same offenses as those alleged in the original indictment. A motion to set aside the amended indictment was made and a demurrer thereto was filed by all defendants. The motion to set aside the amended indictment was mainly predicated upon the ground that it was not an indictment amended by the district attorney after leave granted, but an attempt by the grand jury to return an amended indictment without order of court. The motion was denied and the demurrer overruled. After the entry of not guilty pleas, the cause proceeded to trial before the court sitting without a jury. During the trial, pursuant to the provisions of section 1099 of the Penal Code, the case was dismissed as to defendants Cleo Bond Baylis and Ernest M. Baylis, in order that they might be used as witnesses for the prosecution against the appellants herein.

At the conclusion of the People's case the defendants moved to dismiss each count of the amended indictment. This motion was granted as to counts III and IV and denied as to the remaining counts. At the conclusion of a six weeks' trial, these appellants were found not guilty on count II and guilty on counts I, V, VI, and VII. Motions in arrest of judgment and for a new trial were denied, whereupon judgment was pronounced upon each of the four counts upon which a conviction was had. From these judgments and from the order denying them a new trial and their motion in arrest of judgment, appellants prosecute this appeal.

In count I of the amended indictment, the defendants were accused of the crime of criminal conspiracy, it being alleged that they conspired together and with other persons named in the pleading to commit the crimes of grand theft, a felony; violation of section 476a of the Penal Code, a felony; and violation of section 115 of the Penal Code, a felony. The indictment then goes on to set forth certain conduct and illegal activities and transactions upon the part of the defendants, as well as certain overt acts alleged to have taken place in furtherance of the conspiracy.

Count V charges the defendants with the offense of recording a false instrument; it being alleged that they did willfully, fraudulently, and feloniously and knowingly procure and offer to be filed and recorded a certain deed of trust alleged to have been a false and forged instrument.

Count VI charges the defendants with the crime of criminal conspiracy, a felony, it being alleged that they and other persons named in the amended indictment conspired to commit the crime of violation of section 531 of the Penal Code, a misdemeanor. It is then alleged that as a part of the conspiracy, and in pursuance thereof, the defendants did fraudulently convey certain properties, both real and personal, from one Effie F. W. Davis to the defendant Cleo Bond Baylis, Rae Findly, and other persons unknown to the grand jury, which properties, it is alleged, the said Effie F. W. Davis received by decree of distribution dated January 20, 1936, in the matter of the estate of Emma H. Wilson, deceased, probated in the superior court of Los Angeles county. This count further charges that the conspiracy therein alleged had for its object the deception and defrauding, defeating, hindering, and delaying of creditors, and of depriving such creditors and others of their just debts, damages, and demands. Seven overt acts are charged against the defendants under this count.

The final count upon which appellants herein were convicted, numbered VII in the amended indictment, charges the defendants therein named with the crime of criminal conspiracy, a felony, to wit, a conspiracy to violate section 182 of the Penal Code, subdivision 4, a felony. In this count it is alleged that the object of the conspiracy therein charged was to cheat and defraud the Title Insurance & Trust Company, a corporation, of property by means which were, in themselves, criminal, and the value of which money and property it is alleged was in excess of $200. This count alleges that in connection with an escrow pending with the said Title Insurance & Trust Company, the defendants falsely and fraudulently represented to said Title Insurance & Trust Company that good and valuable consideration was paid in connection with the transfer and conveyance of certain property. This count charges that the inquiries resulting in the alleged false and fraudulent representations were made by the Title Insurance & Trust Company of defendants in order that the former might determine and authorize the issuance of insurance upon the titles and conveyances involved in the escrow in question. Four overt acts in furtherance of the conspiracy are charged in this count.

[1, 2] The first point made by appellants for a reversal of the judgment herein is based upon the refusal of the court to grant their said motion to set aside the amended indictment. The principal ground urged by appellants in support of said motion was that the amended indictment was not legally found by the grand jury, for the reason that it was not an indictment amended by the district attorney after leave granted, but an attempt by the grand jury to return an amended indictment after the defendants had pleaded by way of demurrer to the original indictment. Appellants' claim in this regard is without merit. It is the law that where, as in the instant case, no ruling had been made upon the demurrer, it is the unquestioned right of the grand jury to return a second indictment while the original indictment is in full force and after the defendants have entered their pleas thereto; and, further, such second indictment may be found by the same grand jury which returned the original one, without their hearing any addi-

tional evidence. People v. Follette, 74 Cal. App. 178, 185, 186, 189, 190, 240 P. 502, and cases therein cited. It is only where the demurrer is sustained that the judgment becomes a bar unless the court directs a resubmission to the grand jury. Appellants have not suggested how under any possible conception of the record they were in any way prejudiced by the return of the second indictment. People v. Clawson, 82 Cal.App. 422, 255 P. 552. The case of People v. Seitz, 100 Cal.App. 113, 279 P. 1070, has no application to the case at bar because in the Seitz Case the demurrer had been sustained without leave to amend.

[3, 4] Appellants interposed a general and special demurrer to the second indictment which was overruled by the court. This action of the court is assigned as reversible error. With reference to count I, appellants rely upon section 954 of the Penal Code, asserting that this count charges a conspiracy to commit violation of three separate and distinct sections of the Penal Code. Appellants' claim in this regard is not tenable. The fact that the allegations of this particular count allege the object of the conspiracy to be the commission of three separate and distinct crimes does not change or alter the fact that the crime of conspiracy is the only offense charged in said count. In People v. Welch, 89 Cal.App. 18, 264 P. 324, 325, it was held that there is nothing indicated in sections 182 or 184 of the Penal Code to the effect that a charge of criminal conspiracy must be limited to an agreement to commit but one crime. As was said by the court in the Welch Case: "It would seem to do violence to reason to hold that, where several persons agreed to rob a bank and as a part of the plan they determined to shoot any one who resisted or interfered, they may not be charged in one count with criminal conspiracy because, forsooth, their evil designs contemplated murder as well as robbery." The trend of judicial decisions in this state is to the effect that to do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only. People v. Johnson, 22 Cal.App. 362, 364, 134 P. 339. The language of that section is inclusive and elastic enough to permit the framing of an indictment charging conspiracy to do or commit any or all of the illegal acts referred to therein. People v. MacPhee, 26 Cal.App. 218, 220, 146 P. 522.

[5-7] That portion of appellants' special demurrer directed to count I challenges the sufficiency of the allegations to enable a person of common understanding to know what is intended, in compliance with section 950 of the Penal Code, which requires that the indictment must contain a statement of the facts constituting the offense in ordinary and concise language. Appellants assert that it cannot be ascertained how the defendants "caused" Mrs. Davis to make the conveyances or issue the checks referred to in said count, and also take exception to the use of the word "caused" in connection with the overt acts numbered 1, 6, 7, and 8 in said count. There is nothing particularly difficult about construing the meaning of the word "caused," and reference to Webster's Dictionary reveals the definition of the word "cause" as follows: "To be the cause; or occasion of; to effect as an agent; to bring about; to bring into existence; to make." Synonyms are: "Create, produce, occasion, originate, induce." The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. At common law, where this information came solely from the indictment, much particularity was required. Thus, in charging murder, it was necessary to charge the manner in which the murder was committed and the means used; but under our system of administering criminal justice, as a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be. Section 870, Pen.Code and section 925, as amended by St.1933, p. 2021. And an accused is today better informed as to the case he must meet than was an accused under the detailed form of pleading required at common law. Section 952 of the Penal Code, which formerly required the pleading to set forth the particular circumstances of the offense charged, now as amended, St.1929, p. 303, declares that it shall be sufficient if it charges "in any words sufficient to give the accused notice of the offense of which he is accused." The accused is simply entitled to notice of the offense of which he is charged, but not to the particular circumstances thereof, such detail being furnished him by the transcript of the testimony upon which the indictment or information was founded. People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970. Section 952

must also be read in conjunction with section 951 of the Penal Code, in which latter section there is set out the form of an indictment where an example of our simplified form of pleading in criminal procedure is contained. While appellants base their demurrer entirely upon section 950 of the Penal Code, it is clear that section 950 must be construed in conjunction with sections 951, 952, and 959, as amended by St.1935, p. 859, in order to determine how and in what manner an indictment must allege and name the charge so that a defendant will be able to properly prepare a defense.

[8] Demurring to count V, appellants contend that the allegations thereof fail to show wherein the instrument therein mentioned was false, and urge the same arguments as they set forth with reference to count I. Appellants had the benefit of the voluminous grand jury transcript to know how and in what manner the instrument was false. The allegations of count V specifically notified the defendants of the alleged falsity of the instrument in question, and the details and circumstances upon which the alleged falsity is predicated were furnished them by the transcript of the testimony upon which the indictment was founded. It might here be observed that the allegations in count V of the indictment conform practically verbatim to those used in the case of People v. Standley, 126 Cal.App. 739, 15 P.2d 180, which is a leading case in connection with the interpretation of section 115 of the Penal Code. What we have just said applies as well to the complaint made and the arguments advanced in support of defendants' demurrer to counts VI and VII. The trial court was therefore correct in denying appellants' motion to set aside the amended indictment and in overruling their demurrer thereto.

Appellants contend that the evidence is not sufficient to sustain the decision of the trial court finding them guilty upon any of the four counts. A consideration of this claim on the part of appellants will necessitate a statement of some of the facts as shown by the testimony. The decision of the trial court being against the appellants, it will be only necessary for us in stating the facts to mention those which tend to support the decision. Appellants are husband and wife, practicing law together in the city of Los Angeles. In May, 1934, one James Cares, who was a beneficiary named in the will of one Emma Wilson, employed appellants as his attorneys to resist incompetency proceedings that had been instituted against said Emma Wilson. The latter had a sister, Effie Davis, with whom she lived. Upon the death of Emma Wilson, probate proceedings were commenced to administer her estate. The criminal prosecution with which we are here concerned grew out of the handling by appellants of this property while it was in process of administration as well as before and after it came into the hands of Effie Davis through a decree of distribution entered by the probate court. There was presented to the trial court evidence that in May, 1934, Emma Wilson owned property of the value of some fifty or sixty thousand dollars. During the next month following an examination of her by an alienist, legal proceedings were commenced, resulting in Miss Wilson's being declared incompetent by the superior court; and, although appellant Mrs. Gilbert had been retained by Mr. Cares to look after his interests in connection with the incompetency proceedings, we find Mrs. Gilbert being appointed as Miss Wilson's guardian in September, 1934. Immediately thereafter both appellants moved into the home of their ward, and shortly thereafter Mr. Cares, who had been living there for some fifteen years, and who had employed one of the appellants as his attorney, was forced to move away.

Shortly before Emma Wilson's death, appellant Mrs. Gilbert urged the former to sign a power of attorney giving Mrs. Gilbert the right to sell the property of Emma Wilson so that appellant could "do these things she wanted to do to save all those moneys to Effie Davis." Appellant Mrs. Gilbert acted as attorney for Mrs. Davis and continued to act as such up to the time the indictment in this case was returned. In handling the property of this estate, there was evidence that Mrs. Gilbert used not only her maiden name of Lois Preston, but also the name of Rae Findly, as well as her mother's present name of Emma M. Bowden. There was also testimony that appellant Mrs. Gilbert signed the name of Cleo Bond Baylis to certain instruments, and also signed certain other instruments in connection with the handling of the properties with the names of Rae Findly, L. Petitte, and Erdine Pierce. Appellant Mrs. Gilbert also had property of this estate transferred into the names of Lonnie McCall, B. Padgett, and Emma Small. There is also evidence in the record that in connection with the sale of a ranch in Placer county Mrs. Gilbert directed that Kalis Egg Corporation be made the beneficiary in the trust deed thereon. Two other trust deeds were executed on pieces of property in this estate purportedly signed by Cleo Bond Baylis in which G. D. Gilmore was the beneficiary. Mr. Kalis, who was the sole owner of Kalis Egg Corporation, testified that he knew nothing about this transaction, nor had he given any one permission to make his company beneficiary in said trust deed, nor was he at all interested therein. In connection with the Gilmore trust deed, a Mr. George D. Gilmore testified that he was a friend of appellants; that as far as he knew he was the only G. D. Gilmore in the city of Los Angeles; and that he had never given any one permission to use his name as the beneficiary in said trust deed, nor had he lent any one any amount of money for which these or any other trust deeds had been received by him as security. An independent search of the city directory and telephone directory failed to disclose any other G. D. Gilmore in the city of Los Angeles.

There is also evidence that prior to the death of Emma Wilson, appellant Mrs. Gilbert, in the presence of appellant Mr. Gilbert, Effie Davis, and James Cares, said, "Let's clip Rob Wilson's name off the will. The will is no good anyway. We can make a new will now by somebody holding Emma Wilson's hand to put an X on the bottom of the will, and two witnesses to sign the names on that paper, on that will, and with the help of Dr. Orbison, Dr. Orbison's testimony goes good in court, and the will can be good now, of Emma Wilson."

On or about October 5, 1934, Emma Wilson died, and just prior to that time appellant Mrs. Gilbert was removed by the court as guardian of Emma Wilson and a Mr. Brown was appointed in her place and stead. The evidence further indicates that from September, 1934, up until the trial of the cause in the superior court, Effie Davis and appellant Mrs. Gilbert were constantly together, living either in Mrs. Davis' home or in the home of appellants, or at a ranch near Arcadia, the purchase of which ranch appellant Mrs. Gilbert negotiated with the aid of her husband with money from this estate, and the title to which stood in the name of Erdine Pierce. On October 8, 1934, Robert Wilson, a cousin of Miss Wilson and Effie Davis, filed for probate in the superior court of Los Angeles county the purported will of Emma Wilson dated May 17, 1933. By the terms of this will, Effie Davis was given a life estate in the property and the remainder went to said Robert Wilson, with the exception that James Cares was given a house and lot and an interest in certain personalty. About a week later, appellants employed J. Clark Sellers, a handwriting expert, to examine this will, and advised him that in their opinion the same was a forgery. After a superficial examination of the document, the expert advised appellant Mrs. Gilbert informally that in his opinion the will was not a forgery, but he asked for additional time to examine the document more minutely before he was willing to express a definite opinion. Thereafter, on October 25, 1934, appellants as attorneys for Effie Davis filed for probate a will of Emma Wilson which appeared to be dated October 24, 1933. As to this last-named date appearing on the will, the same handwriting expert testified at the trial of this case that in his opinion the last figure 3 had been altered and that the original date was probably 1932. By the terms of this will, Effie Davis acquired all of the estate of Emma Wilson with the exception of a house and lot and some personalty bequeathed to James Cares. Some time in November, 1934, both Cares and Wilson instituted separate proceedings to contest the probate of the last-named will of Emma Wilson. Again, in December, 1934, appellant Mrs. Gilbert contacted J. Clark Sellers, the handwriting expert, and advised him that a later will had been found under the carpet, and that appellant was now sure that the will of May 17 was a genuine holographic will of Emma Wilson, but that the will found under the carpet bore a later date. Appellant Mrs. Gilbert expressed the opinion to the handwriting expert that the more recently discovered will had probably been stepped on and was therefore very dirty, and several holes were pierced in it, apparently being caused by the same having been stepped upon. She requested the handwriting expert to make an examination of a photostatic copy of the October, 1933, will and to examine the original in the office of the county clerk. On December 22, 1934, the handwriting expert rendered appellant Mrs. Gilbert a written opinion to the effect that the will of October 24, 1933, was entirely written in the hand of Emma Wilson, with the exception that in his opinion the final figure 3 in the date had been altered; that there was a hole in the vital portion of the figure 2, that is, at the bottom thereof, and that in his opinion an oval had been added at the top of what remained of said figure 2 to make it appear a 3; that in his opinion the will had been executed and dated October 24, 1932.

There was further testimony that in January, 1935, appellant Mr. Gilbert approached the attorney for Mr. Cares in the will contest and proposed a settlement with Mr. Cares upon condition that Mr. Cares would withdraw his contest and testify in their behalf in the contest brought by Robert Wilson. Mr. Cares' attorney told appellant Gilbert that this testimony would be contrary to his understanding of the facts, and that therefore he could not permit his client to so testify. Thereupon, appellant Mr. Gilbert said that, if they could not settle with Mr. Cares, then they would settle with Robert Wilson and get him to help them in their defense of the action brought by Cares. Subsequently, Robert Wilson settled his contest with Mrs. Davis, accepting the latter's note in the amount of $10,000. In connection with this transaction several agreements were prepared by appellant Mrs. Gilbert, and it was agreed that appellants would defend Wilson in connection with any litigation which might grow out of the settlement transaction. It might here be noted that both the August and October wills gave the property of Emma Wilson to her sister Effie Davis in fee, with only a small interest to either Cares or Wilson, whereas the May 17 will gave Effie Davis only a life estate.

The evidence indicates that the will contest of James Cares went to trial about June 21, 1935. While a jury was being selected, appellants discussed a settlement of this matter with Mr. Cares personally, outside the presence of the latter's counsel, and reached an agreement of settlement with Mr. Cares. Appellants thereupon advised Mr. Cares' attorney to this effect; the matter was taken up with the trial judge; and upon stipulation the will contest of Mr. Cares was dismissed and the will of October 24, 1933, which will be recalled as the will in connection with which the handwriting expert advised appellants there had been an alteration in the date, was then offered and admitted to probate. By this last-named settlement, James Cares secured a house and lot in the city of Los Angeles and a note signed by Effie Davis for $2,500. The probate court appointed Effie Davis executrix of the estate of her sister, Emma Wilson. This estate, which was appraised by the inheritance tax appraiser of the state of California for the purpose of inheritance taxes at some $60,000, consisted of various pieces of real estate, mortgages, trust deeds, and over 800 shares of Transamerica stock, cash in bank, and bonds.

The record then contains testimony to the effect that approximately four months before the estate of Emma Wilson was distributed to Effie Davis, to wit, on or about August 30, 1935, Mrs. Gilbert took Effie Davis to the transfer office of the Bank of America in San Francisco, and there had Mrs. Davis sign the necessary papers to transfer the stock out of the estate of Emma Wilson and into the name of Emma Small.

At this time the estate of Emma Wilson had a claim for $1,000 against the estate of Mary Slattery, which latter estate was also in process of probate. This claim was compromised for $350, and during the first part of October, 1935, the attorney for the Slattery estate delivered a check for $350 to the appellant Mrs. Gilbert. On October 12, appellant Mrs. Gilbert and Mrs. Davis went to an automobile sales room and traded in an automobile for another car. At that time there was approximately $300 due the finance company, and the aforesaid check received from the estate of Slattery was indorsed by Effie Davis as executrix and by appellant Mrs. Gilbert, who signed the name, "Emma M. Bowden," which was the name in which the new car was to be registered. The $50 difference between the amount due the finance company and the face of the check was received in cash by Mrs. Davis.

The record also discloses that in December, 1935, certain negotiations were had in Placer county in connection with the sale of a certain ranch located there which was a part of the estate of Emma Wilson. These negotiations culminated in the sale of the ranch for $1,000 cash and a first trust deed for approximately $4,650, naming the Kalis Egg Corporation as beneficiary (this is the corporation heretofore referred to, the owner of which denied any authorization to name his corporation as beneficiary, or that he or the corporation had any interest whatsoever in the transaction). An escrow was opened in connection with this transaction at the Placer County Title Company in Auburn, but the

$1,000 check was taken outside of escrow. On the following morning appellant Mrs. Gilbert took the $1,000 check to the Placer county bank in Auburn and requested that a draft be issued by the bank in the amount of $1,000 payable to Lonnie McCall, whom she indicated as a young man there present with her, who appeared to be about thirteen or fourteen years of age. Pursuant to these instructions, the bank issued a draft on the Anglo-California Bank of San Francisco in the name of Lonnie McCall and delivered the same to appellant Mrs. Gilbert, who gave as McCall's address her own home address. From the evidence, apparently the escrow in the Placer County Title Company was never completed. About a week later, appellant Mr. Gilbert appeared at the same automobile sales room above referred to, and, after certain negotiations with regard to interest charges, paid off the contract on the car which he had purchased in the preceding October. This payment was made with the $1,000 draft above referred to payable to Lonnie McCall. This draft was indorsed "Lonnie McCall, I. M. Gilbert, Emma Bowden, by I. M. Gilbert." Of this money, $879.75 was used to pay off the balance due on the automobile, and $120.25 was returned to appellant Mr. Gilbert in the form of a check issued by the automobile dealer and payable to Emma Bowden. It might here be noted that certain evidence was received at the trial indicating that Effie Davis was a person of inferior mentality and subject to the influence of stronger minds than her own. The admissibility of this evidence will be discussed later.

About January, 1935, when the estate of Emma Wilson was nearing the time for final distribution to Effie Davis, the defendants Mr. and Mrs. Baylis appeared upon the scene. Mr. Baylis was a real estate broker and contractor. The evidence indicates that he met Mrs. Effie Davis at appellants' office for the first time, and that an agreement was reached between the appellants, Effie Davis, and Mr. and Mrs. Baylis whereby all of the property to be received by Effie Davis from the estate of her sister would be transferred and assigned into the name of the defendant Cleo Bond Baylis, who was defendant Mr. Baylis' wife. Thereupon appellant Mrs. Gilbert prepared certain deeds and assignments transferring all of the estate of Emma Wilson from Effie Davis to Mrs. Baylis, with the exception of several hundred shares of Transamerica stock. At the same time, appellant Mrs. Gilbert prepared blank deeds and assignments which were signed by Mrs. Baylis but not acknowledged. Effie Davis, however, signed the deeds prepared for her signature, and the same were acknowledged before appellant Mr. Gilbert in his capacity as a notary public. An agreement was drawn under the terms of which Mr. Baylis would receive 10 per cent. commission for managing a certain twelve-court building that was to be erected upon certain estate property at Hermosa Beach. It appears that some question arose as to the validity of these transactions in the absence of some showing of the consideration which passed therefor. At that time Mr. Baylis was conducting his business with the Hollywood State Bank and carrying an account there in the name of Brea Investment Company, and, although he had only approximately $150 in that account, appellant suggested that he draw several checks in the total amount of approximately $49,000 against his account, payable to Mrs. Davis, and that, after she indorsed the same that he deposit them in his account at the bank, thereby accomplishing what in banking parlance is known as "washing" the checks through his account. The apparent purpose of this check transaction will be manifest in a subsequent discussion with reference to their presentation to the title company in support of the claim that a valuable consideration passed in connection with the execution of the deeds and other instruments last hereinabove referred to. This transaction involved five checks totaling approximately $49,000, which were made out payable to Effie Davis and signed by Mrs. Baylis, who was authorized to issue checks against the Brea Investment Company account. Thereafter these checks were indorsed by Mrs. Davis and immediately turned back to Mr. Baylis, who proceeded to deposit the same checks in his bank account and have them canceled as having been paid. We thus find defendant Baylis receiving back his $49,000 worth of checks and appellants and Mrs. Davis retaining all of the deeds which were executed in favor of Mrs. Baylis and those which were executed in blank by Mrs. Baylis. Thereafter the deeds from Mrs. Davis to Mrs. Baylis were recorded.

The transcript also contains evidence that about this time a Mr. McGinnis, who was assisting appellants in some of the legal matters in connection with the Emma Wilson estate, was told by appellant Mrs. Gilbert that in her opinion the thing for Mrs. Davis to do was to transfer her property into the names of third persons and to take a trip either to Europe or Hawaii in order to avoid payments called for in the settlements with James Cares and Robert Wilson. It was further testified that appellant Mrs. Gilbert suggested that some of this property might be transferred into the name of her mother, Mrs. Bowden. Mr. McGinnis, it appears, advised against such procedure, urging that such a transfer would be set aside. On January 20, 1936, the decree of distribution in the estate of Emma Wilson was entered, whereby all of the estate was distributed to Mrs. Davis with the exception of a house and lot which was distributed to Mr. Cares. In the evidence we again find appellant Mrs. Gilbert insisting to Mr. McGinnis that Mrs. Davis should put her property in the names of third persons in order to avoid payments on the settlements theretofore made with Cares and Wilson, and Mr. McGinnis again advising against such procedure.

Along about December, 1935, two trust deeds in which Mrs. Davis held the beneficial interest were paid off to the amount of $5,000. The bank which handled this transaction mailed the check to appellant Mrs. Gilbert, although it was made payable to Effie Davis. About ten days later, appellant Mrs. Gilbert had $1,000 of this check deposited in a bank account and had the bank issue to her a cashier's check for the remaining $4,000 payable to Effie Davis. This cashier's check was later deposited in an escrow in connection with the purchase of certain property known as Lilac Terrace, and the instructions in this escrow showed that the title to this property was to be placed in the name of Rae Findly, who, by the way, was the housekeeper for appellants. In February, 1936, appellants and Mrs. Davis again appeared at the transfer office of the Bank of America in San Francisco and had Mrs. Davis sign the necessary papers to transfer 313 shares of Transamerica stock from the name of Emma Wilson, who was then deceased, into the name of B. Padgett, the latter of whom at some time previous had been a client of appellants in connection with a divorce action.

About this time, defendant Baylis arranged a loan at the Hollywood State Bank for $5,000, and put up as collateral therefor certain of the mortgages and trust deeds which had been assigned to his wife, Mrs. Baylis, by Effie Davis, and which securities came from the estate of Emma Wilson, deceased. The proceeds of this loan were deposited in the bank in an account under the name of "Cleo Bond Baylis Company, by L. Petitte." Defendant Mrs. Baylis' maiden name was Petitte. All checks on this account were drawn by Mrs. Gilbert, who signed such checks, "Cleo Bond Baylis Company by L. Petitte." From the moneys secured from the loan, the construction of the twelve-court building at Hermosa Beach and the improvements on certain property at Hawthorne were paid for. The funds from the sale of the Transamerica stock aforesaid were deposited in this account and used in connection with the building program as well as to purchase an equity in a five-acre ranch at Arcadia, title to which was taken in the name of Erdine Pierce.

About this time, appellant Mrs. Gilbert suggested that the property in which appellants Gilbert were living be transferred into the name of Mrs. Baylis; that Mrs. Gilbert's mother, Mrs. Bowden, had a mortgage on the property for nine or ten thousand dollars, and, if Mrs. Baylis held title to the property, then the Baylises could possibly put a trust deed or mortgage on the property and borrow money to carry on the building program on the property that came from the Wilson estate. About this time, defendant Mr. Baylis told Mrs. Gilbert that if necessary to borrow money he would borrow the same from the Hollywood State Bank and put up trust deeds as security therefor. It then appears that on February 26, 1936, the two trust deeds in which G. D. Gilmore was named beneficiary and the Title Guarantee & Trust Company trustee were recorded. One trust deed was for $6,000, secured by the Hermosa Beach property, and the other, for $3,000, was secured by certain property in Hawthorne that belonged to the Wilson estate. The record is apparently silent as to what became of this money. These trust deeds are the ones in connection with which G. D. Gilmore testified as heretofore set forth that he was without knowledge of or interest in the transactions. While these trust deeds were purportedly signed by Mrs. Cleo Bond Baylis before appellant I. M. Gilbert as a notary public, the defendants Mr. and Mrs. Baylis testified that they knew nothing about these trust deeds whatsoever, and Mrs. Baylis testified that whoever signed her name to the same did so without her knowledge or consent. While there was no direct testimony that appellants Mr. or Mrs. Gilbert signed the name of Mrs. Baylis to these last-named instruments, the appellant Mrs. Gilbert admitted that she had signed Mrs. Baylis' name to other instruments.

Subsequently, during the month of February, 1936, appellant Mrs. Gilbert opened another account in the Echo Park branch of the Bank of America under the name of "Lilac Terrace by Rae Findly." Contemporaneously therewith, arrangements were made to have the manager of the apartment property deposit the rentals in this account, and Mrs. Gilbert from time to time would transfer funds from this account to the Seventh and Olive Street branch of the Bank of America, to apply on the purchase of the Lilac Terrace Apartments.

About March 14, 1936, both appellants and a Mr. Price opened an escrow at the Beverly Hills National Bank & Trust Company. This escrow involved the exchange of certain property owned by Mr. Price for certain property which stood in the name of Cleo Bond Baylis under the transfers from Effie Davis heretofore referred to. The Beverly Hills National Bank & Trust Company placed orders with Title Insurance & Trust Company for preliminary reports as to the title to the property involved in the escrow, and thereafter the bank advised appellant Mr. Gilbert that the condition of the title to certain of the property was not satisfactory, for which reason there might be some difficulty in completing the escrow. Appellant Mr. Gilbert advised the escrow clerk that he would go direct to the title company and there produce necessary evidence to show that Mrs. Baylis had good title. Appellant Mrs. Gilbert and Mrs. Davis contacted the Title Insurance & Trust Company, one of whose vice-presidents stated that the company desired information concerning the consideration paid for the aforesaid conveyances from Mrs. Davis to Mrs. Baylis, and also as to whether or not Mrs. Davis had actually received said consideration. Appellant Mrs. Gilbert advised the trust company that a monetary consideration had been paid, and that these payments were evidenced by checks which could be produced. At the request of the trust company, appellant Mrs. Gilbert, Mrs. Davis, and defendants Mr. and Mrs. Baylis, on March 16, appeared at the trust company, at which time there were produced canceled checks drawn on the Brea Investment Company account in the Hollywood State Bank totaling approximately $49,000, which checks, it was represented, evidenced the consideration paid for the transfers of property from Mrs. Davis to Mrs. Baylis. These checks will be remembered as the checks constituting the so-called "wash" transaction hereinbefore set forth. Upon this occasion defendant Mrs. Baylis, Mrs. Davis, and appellant Mrs. Gilbert signed affidavits setting forth the substance of the conversation and attesting to the fact that the transfer from Mrs. Davis to Mrs. Baylis was in fact a purchase and sale; that Mrs. Davis had no further interest in the property, and that the four checks presented constituted evidence of the consideration paid, and that Mrs. Baylis now owned the property. At no time was the Title Insurance & Trust Company advised of the true facts, nor was it apprised of the nature of the transactions under which Mrs. Baylis was holding title to the property in trust for Mrs. Davis. When appellant Mr. Gilbert appeared before the grand jury, and was asked concerning the purpose of issuing these checks on the Brea Investment Company account totaling approximately $49,000, he testified that it was in order to have evidence of the consideration for these conveyances, because if such evidence were not available the title company would not pass title to the property. During the month of May, 1936, the records of the Hollywood State Bank disclose that more than $3,000 worth of Transamerica stock which had originally belonged to the estate of Emma Wilson and had been transferred into other persons' names were sold and the proceeds deposited in the account of the "Cleo Bond Baylis Company by L. Petitte."

During the month of June, 1936, when the grand jury had issued a subpœna for defendants Mr. and Mrs. Baylis to appear in connection with this case, appellant Mrs. Gilbert advised them that they might as well not get mixed up in this investigation, and, if they went out of town, they could not be served with a subpœna; and further suggested that, if they were in town and were served with process, they would probably go down before the grand jury and be put in jail, but if they would leave town she would see that this matter was straightened out. Mr. and Mrs. Baylis did leave town, and after several weeks defendant Mr. Baylis returned and contacted Mrs. Gilbert, at which time she presented to him a document received in evidence at the trial as People's Exhibit 50, which bore the signatures of Effie Davis, appellant Mrs. Gilbert, and defendant Mrs. Baylis. At the request of appellant Mrs. Gilbert, defendant Baylis also signed the agreement. The evidence indicates that appellant Mrs. Gilbert advised Mr. Baylis that she had prepared that document in anticipation of being requested to present something before the grand jury in this matter, and that she had signed the name of defendant Mrs. Baylis thereto so that appellant would be able to use the document before the grand jury if she was called before Mrs. Baylis returned to town. Although this instrument bore the date January 11, 1936, it was admittedly executed several months later, and read in part as follows:

"That Parties of the Second Part" (Mrs. Davis and Mrs. Gilbert) "in accordance with the construction and finance of same, shall and do convey all title to certain properties, which is attached hereto and marked Exhibit 'A' and listed therein, and that as to the world, Cleo Bond Baylis is to be the owner, but as between the Parties, the Parties of the First Part," (Cleo Bond Baylis and E. M. Baylis) "shall only be trustees acting for each of the parties of the second part of an undivided one-half interest. * *

"That the Parties of the First Part will at no time give out any information, concerning the said title, its properties, or any work thereon, or any information of any nature whatsoever acquired by this agreement without first obtaining permission in writing by each of the Parties of the Second Part."

[9-12] The foregoing narrative of testimony received at the trial, showing as it does a course of conduct on the part of appellants teeming with fraud and replete with intrigue, deception, and duplicity, presents evidence which, if believed, warranted the trial court in finding the appellants guilty on all four counts of the amended indictment upon which they were convicted. And where, as in the instant case, there is substantial evidence tending to support the verdict of the jury, or as in this case the decision of the trial judge sitting without a jury, this court cannot as a matter of law substitute its judgment on the facts for that of the trial judge. No rule of criminal law and procedure is better established in this state. In this case, where a jury was waived, it was the function of the trial court, both as a trier of the facts, and upon motion for new trial after the decision, to determine what facts are established by the evidence. Before this court, on appeal upon the ground of insufficiency of the evidence, can set aside the decision of the trial judge, which decision has been approved by him in the denial of a motion for a new trial, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. The Supreme Court and appellate courts of this state have uniformly held that, where there is evidence tending to support a verdict or decision by a judge sitting without a jury, we cannot disturb the verdict or decision on the ground that it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond question that the weight to be accorded the evidence is a question for the trier of facts, whether judge or jury. People v. Ellis, 188 Cal. 682, 206 P. 753. The decision of the trial judge in this case was again approved by him on motion for new trial. The findings of the trial judge on this subject are conclusive upon this court. It may disturb such a finding only when we can say as a matter of law that there was no evidence to support it. People v. Erno, 195 Cal. 272, 283, 232 P. 710; People v. Tedesco, 1 Cal. 2d 211, 219, 34 P.2d 467; People v. Marble, 8 Cal.2d 139, 64 P.2d 135; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631.

[13, 14] At the trial evidence was offered by the prosecution to the effect that Effie Davis was incompetent. The testimony on this issue was in conflict. Contrary to the claim of appellants, the court was not required to find that Mrs. Davis was either insane or incompetent, but the court did have the right to give consideration to her mental capacity as testified to, in connection with all the other facts and circumstances in the case, as an aid to the court in determining the intent or intentions of the defendants, as well as their honesty or dishonesty in their dealings with Mrs. Davis while handling her money and property. This was relevant to the question of defendants' guilt or innocence; and, as there was a conflict in the evidence on this point, we are bound by the findings of the trial judge thereon. The court did not err in its rulings on the admissibility of evidence relative to the mental status of Mrs. Davis.

[15] It was not error to admit testimony as to the mental condition of Mrs. Davis as given by an attorney who had represented her. Such knowledge was not, as urged by appellants, confidential and privileged. It was held in Oliver v. Warren, 16 Cal. App. 164, 116 P. 312, that an attorney may testify as to the mental condition of his client, and that his knowledge upon this subject is not privileged. The testimony given in the instant case did not disclose that any communications between the attorney and his client were divulged, nor was his testimony based upon any communications had between the witness and his client, Effie Davis.

[16-20] The dismissal of counts III and IV and the acquittal of appellants on count II did not operate as an acquittal of appellants under the conspiracy counts numbered I, VI, and VII, because the substantive offenses charged in counts II, III, and IV did not constitute the only overt acts set forth in the conspiracy counts; and therefore the innocence of appellants of the substantive offenses did not constitute a determination that no criminal conspiracy existed. It is only when the substantive offense charged is alleged as a single entity to be the only overt act in furtherance of the conspiracy that an acquittal of the substantive offense operates as an acquittal of the conspiracy charge based solely thereon. Where, as in the instant case, the portion of the counts charging conspiracy remaining unadjudicated is sufficient to constitute criminal conspiracy, a conviction on the latter charge will stand. In re Johnston, 3 Cal.2d 32, 35, 43 P.2d 541. It is only where the not guilty verdict as to the substantive offense amounts to a finding that none of the overt acts charged as part of the conspiracy were committed, that such a finding in effect acquits the defendant of the offense of conspiracy. Such was not the case here. And further, although some of the overt acts charged in the conspiracy counts were not in themselves of a criminal nature, nevertheless, if such innocent acts were done and performed in preparation to carry out the conspiracy, they are sufficient overt acts within the meaning of the law of this state. People v. George, 74 Cal.App. 440, 451, 458, 241 P. 97; People v. Stevens, 78 Cal.App. 395, 405, 248 P. 696. Appellants' contention is that the checks referred to as substantive offenses in counts III and IV are in effect used as overt acts 2 and 3 in count VI and overt acts 1 and 2 in count VII. However, these various overt acts merely charged that the defendants in this case caused to be issued a certain check payable to Effie Davis in various sums, drawn on the "Brea Investment Company by Cleo Baylis" account at the Hollywood State Bank, whereas the substantive offenses set out in counts III and IV allege that these checks were issued without sufficient funds; that these defendants knew that they had no funds or credits at said bank, and that the checks were delivered with intent then and there to cheat and defraud Effie Davis and the Hollywood State Bank. It is at once apparent that the overt acts above referred to in no way set forth or attempted to set forth a substantive offense of issuing checks without sufficient funds. These particular allegations in the conspiracy counts merely refer to one link in the chain of events occurring before the commission of the substantive offense. Under the holding in the Oliver and Johnston Cases, supra, the defendants could have issued these checks without actually defrauding any one, which would entitle them to an acquittal as to the substantive offense, but the mere issuance of the checks, although innocent, could have been considered by the trial court as a link in the chain of circumstances charged in the conspiracy counts. The conspiracies here charged having been formulated prior to the doing of the foregoing noncriminal acts, we hold they constituted overt acts within the rule laid down in the last-named cases, for they were links in a chain of circumstances showing the gradual unfolding of the plot to obtain the property of the estate of Emma Wilson and of Effie Davis for the unlawful purposes charged in the conspiracy counts of the amended indictment.

[21] In a supplemental memorandum filed since this cause was upon our calendar, appellants direct our attention to the fact that at the trial evidence was introduced showing that the witness Robert J. Wilson obtained a judgment in the superior court for his $10,000 demand against Effie Davis; that such evidence was admitted in support of the charge contained in count VI that the appellants conspired to commit the crime of violation of section 531 of the Penal Code, which denounces a fraudulent conveyance of property to defeat, hinder, or delay creditors in obtaining their just debts, damages, or demands. Appellants lay special emphasis upon the claim that, in order for a debt or demand to be a just debt or demand within the meaning of section 531

of the Penal Code, it must be a debt or demand which is legally valid and collectible, as well as morally just. Appellants insist that the Wilson debt mentioned in count VI was void and without consideration, for the reason that the only consideration for it was a promise on the part of Wilson to testify truthfully as a witness in the will contest, and that such a promise does not constitute a valid consideration for a contract. Appellants cite us to a decision by Division 2 of the District Court of Appeal, Second District, Wilson v. Davis, 76 P.2d 699, 700, reversing the judgment of the superior court which held that Wilson's demand and claim against Effie Davis was valid. We have read the appellate court decision in question, and find that the same does not pass upon the merits of the asserted claim in any respect, and the reversal is based upon the grounds, as stated therein, "The evidence is in sharp conflict on the question of the true consideration for the agreement sued upon. Defendant was entitled to have the jury instructed as to the principle of law applicable in case the jury should find the facts in accordance with her contention." Clearly the reversal of this case has no bearing upon or materiality in connection with the determination of the appeal now before us. The validity or justice of the claim was a mooted question upon which the evidence was in conflict, but in connection with which there was evidence of sufficient substantiality, if believed by the trial court, to warrant a conclusion that the debt was both just and legal, as an obligation assumed by Mrs. Davis for a valuable consideration received by her in connection with the settlement and compromise of the will contest, in which litigation both Mr. Wilson and Mrs. Davis claimed a beneficial interest.

[22] During the trial, and before the defendants had gone into their defense, the court, on application of the district attorney, pursuant to the provisions of section 1099 of the Penal Code, made an order discharging the defendants Cleo Bond Baylis and Ernest M. Baylis in order that they might be called as witnesses for the People. It is the contention of appellants that, pursuant to the provisions of section 1101 of the Penal Code, the dismissal order "amounted to an acquittal," and that thereafter Mr. and Mrs. Baylis could no longer be counted as co-conspirators as a matter of law in deciding whether or not there had been any conspiracy; and further, that in determining whether the judgment of conviction of appellants on the conspiracy charges can stand as a matter of fact and also as a matter of law, Mr. and Mrs. Baylis, by reason of their "acquittal," must be eliminated. Although there is a dearth of authority directly in point in California, we are of the opinion that the result claimed by appellants should not follow where the discharge is pursuant to section 1099 of the Penal Code. The purpose of the order of discharge, as indicated by the statute, is that the defendant who receives the benefit of the order of discharge "may be a witness for the people." The issue remains the same, notwithstanding the discharge, and we would be thwarting the legislative purpose should we engraft an exception upon the statute in favor of a coconspirator. In Ex parte Stice, 70 Cal. 51, 11 P. 459, 461, cited by appellants, in considering the sections here involved, and referring to the status of a defendant so discharged, our Supreme Court says: "He will, under such circumstances, be more at liberty in answering the questions put to him, and will not be hampered by any apprehension of saying anything which may be used against him. He will, as regards the offense about which he is called to testify, feel no restraint whatever from fear of convicting himself. For this object the sections under consideration were enacted. They are enabling in their character."

[23, 24] In prosecutions for conspiracy, the conspiracy must be proved, but it is not essential to the conviction of coconspirators that another or all other coconspirators shall be tried and convicted. It is only where one is convicted and another or others are acquitted, resulting in a repugnancy upon the record, that the only convicted conspirator may be discharged. Where, as in the instant case, the discharge of an alleged coconspirator is not inconsistent with his guilt, but simply bars a subsequent prosecution of him, it does not invalidate the conviction of his coconspirators. Statutes such as sections 1099 and 1101 of the Penal Code, granting an immunity to persons testifying, do not in our opinion acquit the witness of the offense, but the fact of his testifying bars a prosecution for such offense. While Mr. and Mrs. Baylis could not be further prosecuted, their discharge under the provisions of section 1099 did not amount to a declaration of their innocence of the charges against them in the conspiracy counts of the amended

indictment. Bradshaw v. Territory of Washington, 3 Wash.T. 265, 14 P. 594; Rutland v. Commonwealth, 160 Ky. 77, 169 S.W. 584; Weber v. Commonwealth, 24 Ky. Law Rep. 1726, 72 S.W. 30; Williams v. State, 169 Ind. 384, 82 N.E. 790; Berry v. State, 202 Ind. 294, 165 N.E. 61, 173 N.E. 705, 72 A.L.R. 1177.

[25] Holding as we do that the discharge by the court as aforesaid of defendants Mr. and Mrs. Baylis does not eliminate them as coconspirators, makes it unnecessary to discuss appellants' next contention, that being husband and wife, they are in law but one person, with but one will, and therefore no prosecution for conspiracy can be maintained against them. It is elementary that, where some third person joins in the conspiracy, the common-law rule just mentioned does not apply.

Appellants challenge the correctness of many rulings made by the trial court, the narration of which would unduly prolong this already lengthy opinion. However, we have painstakingly read the voluminous reporter's transcript in this case, containing as it does more than 3,000 pages; we have carefully considered the assignments of error in connection with the trial court's rulings, and have read appellants' briefs in connection therewith—from all of which we conclude that none of the rulings complained of militated against the substantial rights of appellants. The appellants had a fair and impartial trial—in fact, the learned trial judge displayed to the defense unusual consideration and patience. His decision was based upon clear and convincing proof. No other points raised require consideration.

[26] The purported appeal from the order denying the motion in arrest of judgment is dismissed, for the reason that the statute does not authorize an appeal to be taken from such order by a defendant.

For the foregoing reasons, the judgments and order denying defendants' motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J., DORAN, J.

On Petition for Rehearing.

PER CURIAM.

As suggested by appellants in their petition for rehearing, Emma Small was not Mrs. Gilbert's mother, but in the opinion was inadvertently referred to as such; and therefore, commencing on line 22, page 17, of said opinion (which commencing point is line 20, col. 2, page 777 of 78 P.2d), the words "who was Mrs. Gilbert's mother" are stricken.

The petition for rehearing is denied.

11 Cal.2d 243

McCOLGAN v. JONES, HUBBARD & DONNELL, Inc., et al.

S. F. 15968.

Supreme Court of California.

April 22, 1938.

Rehearing Denied May 19, 1938.

1. Appeal and error 🔑339(3)
Dismissal and nonsuit 🔑79

An order granting a motion for nonsuit is effective for all purposes when entered in clerk's minutes, and an appeal must be taken within 60 days from entry thereof. Code Civ.Proc. § 581, as amended by St.1935, p. 1954.

2. Dismissal and nonsuit 🔑79

The effectiveness for all purposes of orders entered in clerk's minutes under statute authorizing dismissal of action or entry of judgment of nonsuit does not depend on whether word "dismissal" or word "nonsuit" is used, but in either event there is a "dismissal" within meaning of portion of statute relating to entry of dismissals. Code Civ.Proc. § 581, as amended by St.1935, p. 1954.

[Ed. Note.—For other definitions of "Dismissal," see Words & Phrases.]

3. Dismissal and nonsuit 🔑44

The term "nonsuit" is broadly applied to a variety of terminations of an action which do not adjudicate issues on the merits.

[Ed. Note.—For other definitions of "Nonsuit," see Words & Phrases.]

4. Statutes 🔑212

The Legislature is presumed to know decisions of appellate courts and to have them in mind when adopting amendments to statutes which courts have construed.

5. Appeal and error 🔑347(1)

Where court's oral pronouncement entered in clerk's minutes is not intended as rendition of order or judgment of nonsuit, but as a memorandum of order to be rendered thereafter, time for appeal does not commence to run until order or judgment is entered. Code Civ.Proc. § 581, as amended by St.1935, p. 1954.

6. Appeal and error 🔑347(1)

Where order stating that motion for nonsuit was granted had been entered in clerk's minutes and noted in register of actions, an appeal could be taken therefrom without necessity for entry of a judgment of dismissal, and plaintiff's failure to take appeal within required time necessitated dismissal thereof. Code Civ.Proc. § 581, as amended by St.1935, p. 1954.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by R. McColgan against Jones, Hubbard & Donnell, Inc., and others. From an order granting defendants' motion for a nonsuit, plaintiff appeals.

Appeal dismissed.

Prior opinion, *72 P.2d 764*.

George D. Collins, Jr., of San Francisco, for appellant.

Ackerman, Weyland & Mathews, and Theodore M. Monell, all of San Francisco, for respondents.

SEAWELL, Justice.

This is a motion to dismiss an appeal on the ground that it was taken too late. The appeal is from an order of the court granting defendants' motion for a nonsuit. Said order was entered in the clerk's minutes.

The question involved is whether under section 581, Code of Civil Procedure, as amended by St.1935, p. 1954, an appeal may be taken from an order of nonsuit entered in the clerk's minutes and noted in his register of actions, or whether a judgment of dismissal must thereafter be entered on said order and the appeal taken from said judgment. If the order is appealable, the appeal herein was taken too late, and must be dismissed. If the order was inoperative as a final judgment, then the appeal is premature, since no judgment has been entered on said order. In such event, the appeal should be dismissed as premature, without prejudice to the right of the parties to take further steps in the trial court and to appeal from any judgment thereafter entered.

It would extend this opinion unduly to quote section 581, Code of Civil Procedure, in full. The section commences as follows: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases." The instances referred to by the Code, briefly, are: (1) By the plaintiff before trial. (2) By either party upon the written consent of the other. (3) By the court when either party fails to appear at the trial and the other party asks for "the dismissal."

(4) By the court when the plaintiff abandons the case upon the trial. (5) "By the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case."

After listing the cases in which "an action may be dismissed, or a judgment of nonsuit entered," the section concludes as follows: "The dismissals mentioned in subdivisions one and two hereof, when written consent of the attorney of record of the party requesting the dismissal is filed, must be made by entry in the clerk's register or in the justice's docket, as the case may be, and are effective for all purposes when so entered.

"The dismissals mentioned in subdivisions one and two hereof, when written consent of the attorney of record of such party is not filed, and the dismissals mentioned in subdivisions three, four, and five of this section, must be made by order of the court entered upon the minutes thereof, or in the justices' docket, as the case may be, and are effective for all purposes when so entered; but the clerk, in superior and municipal courts, must note such orders in his register of actions in the case."

It is to be inferred in the case herein that the motion for nonsuit was granted under subdivision 5, section 581. It is the contention of plaintiff that under section 581 a "dismissal" is effective for all purposes when the court's order is entered in the clerk's minutes, but that this provision does not apply to a "judgment of nonsuit."

[1] This contention is in conflict with a line of well-considered cases of our appellate courts, including this court. Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 P. 882; Henry v. Lingsweiler, 81 Cal.App. 142, 143, 253 P. 357; Bengel v. Traeger, 100 Cal.App. 526, 527, 280 P. 538; Lewis v. Hammond Lumber Co., 114 Cal. App. 390, 300 P. 49; Finch v. Ekstrom, 115 Cal.App. 381, 1 P.2d 516; Tromanhauser v. Grisemer, 123 Cal.App. 153, 11 P.2d 32, 33; 2 Cal.Jur. 402; 9 Cal.Jur. 565. Appellant's plea is, in effect, that said cases should be repudiated. By virtue of said cases it has become a settled rule of practice that an order granting a motion for nonsuit is effective for all purposes when entered in the clerk's minutes, and an appeal must be taken within sixty days from such entry. The rule is clearly stated in Tromanhauser v. Grisemer, supra, as follows:

"The entry of the order [granting motion for nonsuit], therefore, is equivalent to a final judgment and it finally disposes of the matter to which it relates. It is not necessary that a formal judgment of dismissal follow the order granting the motion for a nonsuit. The order of nonsuit, when *entered in the minutes* of the court, constitutes the *judgment of nonsuit* and is a *dismissal* of the action, or those causes of action to which it relates, since the statute declares that such an order so entered in the minutes is 'effective for all purposes.'" (Italics supplied.)

Said cases properly declare the law. A nonsuit is but a form of dismissal of an action. The only reference to a "nonsuit" is in the opening sentence of the section. The word "dismissal" appears in several places. If the provisions of the concluding portion of the section applied only to dismissals which were not in terms nonsuits, there would be an omission in the section to make any provision whatsoever with regard to nonsuits granted under the section.

[2, 3] The section provides for a dismissal *or* judgment of nonsuit in each of the five instances enumerated in the section. The term "nonsuit" in this state is no doubt now most commonly applied to dismissals under subdivision 5 of the section, when plaintiff fails to prove his case, but its application is not so limited by the section. The definition of the term "nonsuit," as given in legal dictionaries by means of reference to cases where the term has been considered, indicates that it is broadly applied to a variety of terminations of an action which do not adjudicate the issues on the merits. 2 Bouvier's Law Dictionary, Rawle's Third Revision, p. 2360; Black's Law Dictionary; Words and Phrases. The effectiveness for all purposes of orders entered in the clerk's minutes under section 581, Code of Civil Procedure, should not depend on whether the dismissal is in terms a "dismissal" or uses nonsuit terminology. In either event there is a dismissal within the meaning of the concluding paragraphs of section 581.

[4] That the interpretation declared by the line of cases above cited is in accord with the legislative intent in the enactment of the section is further indicated by the fact that, although the Legislature has several times amended the section, it has never made an amendment with the view of changing the rule frequently announced by the appellate decisions of this state. The Legislature is presumed to know the deci-

sions of appellate courts and to have them in mind when adopting amendments to statutes which the courts have construed. Hoffman v. McNamara, 102 Cal.App. 280, 285, 282 P. 990; Wiggins v. Pacific Indemnity Co., 134 Cal.App. 328, 334, 25 P.2d 898; Robertson v. Langford, 95 Cal.App. 414, 424, 273 P. 150; 23 Cal.Jur. 783.

[5, 6] It is true that, where the court's oral pronouncement, entered in the clerk's minutes, is not intended as the rendition of the order or judgment of nonsuit, but as a memorandum of an order of judgment thereafter to be rendered, the time for appeal does not commence to run until such order or judgment is entered. Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 36 P.2d 688. But this is not the situation in the instant case. Here the order was that the "motion for nonsuit be and the same is hereby granted." In Lewis v. Hammond Lumber Co., 114 Cal.App. 390, 300 P. 49, 50, the order was as follows: "Defendant's motion for a nonsuit is by the court granted." It was held that this order was final and that the time for appeal commenced to run from its entry in the clerk's minutes, notwithstanding a more formal judgment, signed by the judge, was entered thereafter. See, also, the orders in Bengel v. Traeger, supra; Brown v. Sterling Furniture Co., supra; Finch v. Ekstrom, supra.

In Ferris v. Baker, 127 Cal. 520, 59 P. 937, 939, the following entry was held to be a memorandum of an order or judgment thereafter to be rendered: "Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted." A formal judgment was thereafter entered. There may be reasons of fact appearing in the record of said case and not fully stated in the opinion which justified the interpretation of the first entry as a memorandum merely. In so far as said decision and Stebbins v. Larson, 4 Cal.App. 482, 88 P. 505, are in conflict with the rule definitely announced in the later cases herein cited, they must be regarded as overruled by them.

The meaning and effect of the language used in the instant case cannot be distinguished from the language used in Lewis v. Hammond Lumber Co., supra, and other cases herein cited. There is not to be found a fact or a word of intimation from which the inference may be drawn that the order was a memorandum merely or that the court in disposing of the matter intended to make any other or further order as a final determination of the action.

The appeal must be and therefore is dismissed.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; CURTIS, J.

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11 Cal.2d 180

In re BOWER'S ESTATE.

BOWER v. DE BILLIER.

L. A. 16412.

Supreme Court of California.

April 20, 1938.

1. Wills 🔑130

The court must apply the pertinent rules of law to the entire instrument as executed by deceased and not as deleted and reconstructed by the court, as respects whether instrument is a validly executed holographic will. Probate Code, § 53.

2. Wills 🔑130

In determining whether instrument is a validly executed holographic will, all parts thereof in the handwriting of the deceased, whether or not indispensable thereto, must be considered. Probate Code, § 53.

3. Wills 🔑130

In determining whether instrument was validly executed holographic will, words and figures appearing at the beginning of will and inserted in handwriting of deceased in blank spaces provided therefor in the printed form employed by deceased must be considered as well as latter portion of instrument disposing of estate and entirely in deceased's handwriting and dated and signed by deceased. Probate Code, § 53.

4. Wills 🔑132

An holographic will is not effective unless entirely written, dated, and signed by the hand of the testator. Probate Code, § 53.

5. Wills 🔑132

A testator inserting words in his own handwriting in blank spaces appearing in printed form of will intended to incorporate in his will the printed portions among which the writing appeared, and hence the will was not a valid holographic will because not entirely "written by the hand of testator" as required by statute. Probate Code, § 53.

6. Wills 🔑132

An holographic will is invalid if printed matter appearing on the paper is directly or indirectly incorporated or included in the provisions written by the hand of the decedent. Probate Code, § 53.

7. Wills 🔑132

The mere presence of printed matter on the paper is not fatal to the validity of an holographic will written thereon if such printed matter is not directly or indirectly included or incorporated in the will as written by the hand of the decedent. Probate Code, § 53.

In Bank.

Appeal from Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the estate of Rowzee J. Bower, also known as R. J. Bower, deceased, wherein Anna K. de Billier presented a document for probate as the last will and testament of the deceased. Walter V. Bower filed a contest. From an order admitting the document to probate as the last will and testament of the deceased and appointing Anna K. de Billier administratrix with the will annexed, Walter V. Bower appeals.

Order reversed, with directions.

Perry Evans, of San Francisco, for appellant.

Claflin, Dorsey & Campbell, of Bakersfield, for respondent.

WASTE, Chief Justice.

This is an appeal from an order admitting a document to probate as the last will and testament of the decedent and appointing respondent administratrix with the will annexed. The document bears date of March 4, 1932, and purports to devise the decedent's entire estate to respondent, a stranger to the blood. It was admitted to probate as an holographic will, the court below finding that it was "entirely written, dated and signed by the hand of the said decedent." The contestant and appellant is a brother of the decedent who has contended at all times that the document is invalid as an holographic will because not entirely in the handwriting of the decedent. He claims as an heir at law and as a devisee under an earlier testamentary effort by the terms of which the decedent undertook to dispose of his estate in equal shares to his sister and two brothers. This earlier document was likewise found by the court below to be entirely written, dated, and signed by the decedent, but was denied probate because of the existence of the later and inconsistent document which, as stated, was found to be validly executed.

In order to facilitate our discussion of the issue whether the later document was properly admitted to probate as a validly executed holographic will, we shall quote all of the reading matter appearing on the paper. For purposes of clarity we italicize all portions that are in the handwriting of the decedent. All other portions are printed matter, common to a stationer's form, and appeared upon the paper prior to the decedent's effort to execute a will thereon. The paper reads:

"Last Will and Testament

"In the Name of God, Amen, I, *R. J. Bower* of *Bakersfield,* State of *California* of the age of *61* years, and being of sound and disposing mind and memory and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament in the manner following, that is to say:

"First: *I give and bequeath all my Property of Every Kind and Description Whatsoever Whether Real or Personal to Anna K. deBillier*

"Secondly: *R. J. Bower*
"Mach fourth
"Ninteen hundred thirty two"

[1] The court below admitted to probate only the latter portion of the foregoing document, reading, "I give and bequeath all my Property of Every Kind and Description Whatsoever Whether Real or Personal to Anna K. deBillier. R. J. Bower, Mach fourth Ninteen hundred thirty two," on the ground that it was entirely written, dated, and signed by the decedent as required by section 53 of the Probate Code. However, in so doing, it disregarded certain other portions of the document also in the handwriting of the decedent. This was error on the part of the court below. It is the function of the court to apply the pertinent rules of law to the entire instrument as *executed* by the decedent and not as deleted and reconstructed by the court. In Re Es-

tate of Rand, 61 Cal. 468, 471, 44 Am.Rep. 555, wherein the blank spaces in a form will were filled by the decedent, it was held that the instrument should be read and considered in its entirety in passing upon its validity.

To the same effect is the decision in Re Wolcott's Estate, 54 Utah 165, 180 P. 169, 170, 171, 4 A.L.R. 727, wherein the decedent likewise filled the blank spaces provided in a stationer's form will and then in her own handwriting made several specific bequests. The proponent of the will offered for probate only such portions as were in the handwriting of the decedent. In rejecting this offer, the court declared that: "If there are authorities sustaining the right of a party to offer for probate as a will such portions of a document as he may desire for the purpose of making a case, while excluding other portions which would defeat his purpose, such authorities are not well considered, and we would hesitate to follow them. If the matter excluded from the offer was totally disconnected therefrom, was not germane, or was entirely irrelevant to the purpose and object of the instrument, a different question would be presented. Such matter might be treated as surplusage and disregarded. * * * The fact that the matter written by deceased in her own hand, standing alone, might constitute a complete testamentary disposition of her property, does not alter the case. The document offered by appellant is not the document prepared by deceased as her will."

[2-4] It is our duty, therefore, in determining the validity of the instrument here before us, to consider all parts thereof that are in the handwriting of the decedent, whether or not indispensable thereto. Then, and only then, can the established rules of law be correctly applied to the document as a whole and an accurate conclusion reached as to its validity. This conclusion obviously requires us to take into account the words and figures "R. J. Bower," "Bakersfield," "California," and "61," appearing at the beginning thereof and inserted in the *handwriting* of the decedent in the blank spaces provided therefor in the printed form employed by the decedent. When all portions in the handwriting of the decedent are considered and the instrument is read as a whole, we are constrained to declare that it is not entirely written by the hand of the decedent and is therefore invalid as an holographic will. It always has been, and still is, the law of this state that an holographic will to be effective must be entirely written, dated and signed by the hand of the testator. See former section 1277, Civ.Code, section 53, Prob. Code. The authorities wherein this rule is discussed are legion. We need mention but two. In Re Estate of Thorn, 183 Cal. 512, 192 P. 19, the instrument was declared invalid as an holographic will because of the presence in the body thereof of a rubber stamp impression of the name of the property or country place therein sought to be devised, and this despite the presence in the document of an additional and adequate description of the property in the handwriting of the decedent. Necessarily, it there had to be held that the presence in the body of the will of printed matter precluded the document from being entirely written by the hand of the testator.

In Re Estate of Bernard, 197 Cal. 36, 239 P. 404, the document was written on hotel stationery and read as follows:

"The following 4 sheets of paper included, *Long Beach, California,* Oct. 12, 1918.

"I, Josephine Bernard of the City and County of Denver, Colo. do hereby declare this to be my last will and testament."

Then followed several dispositive provisions. All of the document but the italicized words "Long Beach, California," was in the handwriting of the decedent. The italicized words were printed on the paper. As one ground of the decision it was held that the instrument was not entirely written by the hand of the decedent. This was so, it was stated, because the decedent by writing in her own hand above the printed date line the words "The following 4 sheets of paper," evidenced an intention that "The printed words [were] *incorporated* in and doubtless were intended to be made a part of the heading of the document."

[5] So it is in the present case. Consideration of all portions of the document here involved which are in the handwriting of the decedent, and particularly the written inserts in the blanks provided in the printed form, definitely indicate that the decedent intended to include and incorporate in his will the printed portions among which the written inserts appear. That this is so may be demonstrated by one illustration. The figures "61" in the handwriting of the decedent are meaningless unless read in connection with the printed words "of the age of [61] years." True, such introductory written and printed matters are not essential to a testamen-

tary document. But, the fact remains that the decedent herein concluded that they were indispensable to and should be a part of *his* will and he manifestly made them a part of *his* will. This is not the first instance wherein matter, unnecessary from a purely legal viewpoint, has made its way into the body of a document testamentary in character. As stated above, we are to read the decedent's will as *he wrote it* and not as we would write it in order to cause it to comply with established legal principles. We therefore repeat that the document here before us is invalid because not entirely written by the hand of the testator as required by the provisions of section 53 of the Probate Code and the holdings in the Thorn and Bernard Cases, supra.

In declaring the instrument invalid as an holographic will, we have not lost sight of the decisions in Re Estate of Oldham, 203 Cal. 618, 265 P. 183 and Re Estate of De Caccia, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393. As we read the latter two cases, they hold that the mere presence of printed matter upon the paper does not vitiate an otherwise valid holographic will written entirely by the hand of the testator *if such printed matter be not expressly or impliedly incorporated in the provisions which are in the handwriting of the decedent.* Examination of the last two cited cases discloses that the extraneous matter involved consisted in one instance of a printed letterhead and in the other of a line containing the printed words "Oakland, California," appearing at the top of one page of an unfolded double sheet of paper used by the testator. In each of these cases this court took occasion to point out that such printed matter was in no way incorporated in or made a part of the written instrument. In the Oldham Case, supra, 203 Cal. 618, 620, 621, 265 P. 183, 184, in discussing the effect of the printed letterhead which merely disclosed the name and office location of the testator, this court declared that "we find no reference whatever to the printed words appearing upon stationery used by the deceased in the preparation of said instrument. These printed words are not expressly by direct reference, or impliedly, by inference or otherwise, made a part of the written instrument set forth on the sheets of paper upon which they appear. * * * The printed words appearing upon the three sheets of paper upon which the deceased attempted to write his will are wholly disconnected from the writing itself, and they form no part thereof. Our attention has not been called to any authority, nor are we aware of any such, which holds that the mere presence of printed words upon a sheet of paper, used by a person for the purpose of writing thereon an holographic will, renders the will invalid *when such printed matter is no part of the writing, and is wholly dissociated therefrom.*" The latter part of the foregoing quotation, and a reading of the case, definitely indicates that the court had clearly in mind, and indirectly, if not directly, approved the rule of the Thorn and Bernard Cases, supra, which rule, we think, is controlling here.

In Re Estate of De Caccia, supra, 205 Cal. 719, 724-726, 273 P. 552, 554, 61 A.L.R. 393, wherein this court held that the printed words "Oakland, California," appearing at the top of one page of an unfolded double sheet of paper used by the testator, did not invalidate the will there involved, it was stated that "The printed words are not preceded by any writing of the decedent in which a reference is made to said printed matter, as was found to be the case in Re Estate of Bernard, supra, indicating that it was the intention of the testator to make them a part of the instrument. * * * Even if the testator intentionally wrote some part or the whole of the first line above the printed matter, but did not make any reference therein to the printed words, we hardly see how the mere fact of this relative position of the words in the instrument would indicate any intention to make the printed words a part of the will. * * The fact, therefore, that a part of the first line, written by the deceased, was slightly above the printed words, does not, in our opinion, show any intention to make the printed matter upon the paper a part of the document written thereon. * * * Nowhere in said instrument is there any reference made to the printed words upon the sheet of paper used by said decedent for the purpose of writing his will. The printed words are in no way essential to the validity of the instrument as an holographic will, and we are not to presume that the decedent made them a part of the instrument he executed *without some evidence appearing upon the face of the instrument itself manifesting such an intention.* The mere presence of printed matter upon stationery used by a person for the purpose of writing his holographic will *which forms no part of the written instrument, and to which no reference directly or indirectly is made in the written instrument,* will not destroy the effect of such instrument as an holographic will." (Italics ours.) Here, again, it may be said that the court had in mind the rule of the earlier cited cases to the effect that printed matter appearing on the paper and which may reasonably be said to have been intended by the decedent to constitute a part of his attempted holographic will destroys the validity of the same.

[6, 7] In the instant case, as already pointed out, the written words, at least indirectly, refer to and include in the will as written and executed by the decedent the printed matter appearing upon the form employed by the decedent. It appears obvious that the testator by inserting words in his own handwriting in the blank spaces appearing in the printed form intended that such written words should be read with and, where necessary, explained or given meaning by reference to the printed portions of the form. The document, as executed by the decedent, may not reasonably be read in any other light, respondent's contention to the contrary notwithstanding. It clearly appears, therefore, from the face of the will itself, that the printed matter was intended by the decedent to be incorporated in the will as executed by him. This, as already indicated, is fatal to its validity.

In passing, it should be stated, merely for purposes of clarity, that the Thorn and Bernard Cases, supra, here relied on, are not in conflict with the later Oldham and De Caccia Cases, supra. These two lines of cases apply to different factual situations and are consistent and distinguishable one from the other. The distinction is expressly recognized in the two later cases. Under the Thorn and Bernard Cases, an holographic will is invalid if printed matter appearing on the paper is directly or indirectly incorporated or included in the provisions written by the hand of the decedent. Such, as we have shown, is the factual situation which confronts us in the present case. While under the later Oldham and De Caccia Cases, the mere presence of printed matter on the paper is not fatal to the validity of an holographic will written thereon if such printed matter be not included or incorporated, directly or indirectly, in the will as written by the hand of the decedent.

In closing, it should be added that section 53 of the Probate Code, the counterpart of the former section 1277 of the Civil Code, offers no obstacle to the conclusion here announced. The cited Code section merely has codified the rule of the De Caccia Case, supra, by adding to the declaration that an holographic will is subject to no other form than that it be entirely written, dated, and signed by the hand of the testator, an additional sentence to the effect that "No address, date or other matter written, printed or stamped upon the document, *which is not incorporated in the provisions which are in the handwriting of the decedent,* shall be considered as any part of the will." That this sentence was added to the section to codify the rule announced in the De Caccia Case appears from the code commissioner's statement to that effect appended by way of note to the section. Respondent concedes this to be so. But, as we have shown, the rule announced in the De Caccia Case is not applicable to the factual situation here presented.

The order appealed from is reversed, with directions to the court below to proceed as herein indicated.

We concur: CURTIS, J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

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11 Cal.2d 172

COWELL v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (two cases).

S. F. 15964, 15965.

Supreme Court of California.

April 19, 1938.

1. Workmen's compensation ⟹1430

Where evidence showed without conflict that corporation operated ranch as agent of joint owners thereof at time of fatal injury to employee thereon, the Industrial Accident Commission properly held both corporation and such owners liable as "employers" for death benefits due such employee's dependents. Gen.Laws 1931, Act 4749, as amended.

[Ed. Note.—For other definitions of "Employer," see Words & Phrases.]

2. Workmen's compensation ⟹192

Both undisclosed principal and his duly authorized agent, through whom he employs help, are "employers." Gen.Laws 1931, Act 4749, as amended.

3. Workmen's compensation ⚷1792, 1908

Denial of corporation's application for writ of review after entry of Industrial Accident Commission's findings and award, discharging owners of ranch operated by corporation as defendants in proceedings to recover compensation for injuries to employee thereon, but imposing liability on corporation pursuant to stipulation that it was employer and assumed liability, did not establish law of case on such question, nor were such findings and award res judicata on subject of owners' status in proceedings, brought by employee's widow and minor children within period during which commission had continuing jurisdiction of cause, to recover compensation for his death as result of such injuries. Gen.Laws 1931, Act 4749, as amended.

4. Workmen's compensation ⚷1937

The owners of ranch, operated by corporation as their agent at time of injury to employee thereon, were not prejudiced by Industrial Accident Commission's failure to order joinder of corporation as defendant in proceeding by such employee's minor children to recover compensation for his resulting death, as well as in like proceeding by his widow, where commission's orders plainly evidenced its intention to consolidate such claims and join such owners, estate of their deceased co-owner, and corporation as defendants in consolidated proceeding, and corporation did not complain of such omission, but assumed liability for compensation and paid sums awarded as they fell due. Gen.Laws 1931, Act 4749, as amended.

5. Workmen's compensation ⚷1771

The estate of deceased part owner of ranch should have been held liable with co-owners thereof as employer for compensation awarded dependents of deceased ranch employee under Workmen's Compensation Act, so as to entitle co-owners to contribution from such estate. Gen.Laws 1931, Act 4749, as amended.

6. Workmen's compensation ⚷1857

Ranch owners, not raising question of unreasonableness of award of compensation for ranch employee's death because of failure to hold estate of their deceased co-owner also liable as employer in their application to Industrial Accident Commission for rehearing, are precluded from urging it in certiorari proceedings to annul commission's findings and award. Gen.Laws 1931, Act 4749, § 64(c).

7. Workmen's compensation ⚷1947

The Industrial Accident Commission's award, imposing liability on ranch owners and corporation operating ranch as their agent for compensation of deceased ranch employee's dependents, will not be annulled in certiorari proceedings by such owners as unreasonable in subjecting them as uninsured employers to possible civil action and statutory penalties despite fact that award is being paid by corporation and payment thereof is secured by latter's certificate of self-insurance. Gen.Laws 1931, Act 4749, § 29(b).

◆

In Bank.

Certiorari proceedings by Samuel Henry Cowell and Isabella M. Cowell, respectively, to annul the Industrial Accident Commission's findings and award, imposing liability on petitioners and a corporation as employers to Josephine Fimby and Raymond Fimby and another, represented by their guardian ad litem, Mary Pena, for compensation under the Workmen's Compensation Act for the death of Samuel Fimby, employee.

Award affirmed.

George C. Faulkner, William T. Doyle, Henry G. Sanford, and Faulkner, Doyle & Sanford, all of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

SEAWELL, Justice.

These two proceedings in certiorari, Nos. S. F. 15964 and S. F. 15965, were instituted by petitioners S. H. (Samuel Henry) Cowell and I. M. (Isabella M.) Cowell, respectively, to secure the annulment of findings and award made by the Industrial Accident Commission, imposing liability upon the Henry Cowell Lime & Cement Company, a corporation, and upon petitioners, as employers on May 15, 1934, of Samuel Fimby, a laborer who was injured while working upon the Carey Ranch at Davis, Cal. The contention of petitioners is that they were not the employers of said laborer, but that the corporation alone was his employer.

The Henry Cowell Lime & Cement Company, a corporation, is extensively engaged in the manufacture of lime and cement. Its principal plant is located at Santa Cruz, Cal. It has business offices in several of the principal cities of the state. The business of the manufacture of cement and lime has no kindred relation to the management or business of conducting the stock farm and ranch located at Davis, Cal. The plant of the corporation and business conducted in the manufacture and sale of lime and cement are situate in different counties and widely separated by distance from the Davis stock farm and ranch. It does not appear that as a business enterprise either was in any way related to or interdependent upon the other. Ordinarily no natural relation exists between the manufacture of lime and cement and the business of raising stock or conducting a farm.

Samuel Fimby was hired by the foreman of the ranch at Davis for a period of about three weeks to drive the team on the hayrake. On the evening of May 15, 1934, the second day of his employment, he was knocked down when one of the horses took fright as he was unhooking the team. He sustained a broken leg and minor lacerations. The leg injury caused a continuing disability, correction of which was attempted by surgical operation on August 18, 1936. He passed away during the operation. Three dependents survived him, his widow and minor sons, aged four and two years.

The foreman of the ranch immediately reported the injury to the Cowell corporation at San Francisco, and shortly after the injury the employee filed an application with the Industrial Accident Commission for adjustment of his claim to compensation. In this application he named the corporation as his employer. It appears that the ranch was operated by the corporation but it was owned jointly by Henry and Isabella Cowell (these petitioners), and by the estate of their deceased sister, Helen E. Cowell, which estate was then in course of probate. Petitioners, the estate, and one W. H. George, were the principal stockholders, in respective minority interests, of the corporation. Henry Cowell was also president of the corporation. W. H. George was its secretary. The corporation held a certificate of self-insurance. Petitioners, as individuals, were uninsured.

When the application for compensation first came on for hearing before the commission, W. H. George offered to stipulate that petitioners were the employers, and the commission thereupon ordered that they be joined as defendants in the proceeding. The proffered stipulation, however, was never accepted, and at a later hearing W. H. George moved, on behalf of petitioners, that it be withdrawn. He then further offered to stipulate that the corporation was the employer, and would assume liability. This latter stipulation was accepted by the employee's counsel. It was followed by the entry, on February 28, 1935, and on July 31, 1936, of findings and amended findings, which discharged petitioners but held the corporation liable as employer, and ordered payment to the employee over an indefinite period of temporary total disability benefits, and of medical expense. These payments were made by the corporation up to the death of the employee on August 18, 1936.

On September 3, 1936, Mrs. Josephine Fimby, the widow of the deceased, filed with the commission an application for death benefit, wherein she named the corporation as decedent's employer. On September 28, 1936, the two minor sons of decedent, by their attorney, also filed an application for death benefit, but this application named as employer only petitioners Henry and Isabella Cowell, and not the corporation. The two applications came on for hearing on November 5, 1936. The commission ordered that petitioners be joined as parties defendant in the matter of the widow's claim. Later it ordered that the two claims be consolidated, and that the estate of Helen E. Cowell be joined as party defendant therein. The hearing of the consolidated proceeding resulted in the entry on April 22, 1937, of findings and award in favor of the three applicants and against both the corporation and petitioners Henry and Isabella Cowell, no mention being made of the estate of Helen E. Cowell. A petition for rehearing by the commission was denied.

Henry and Isabella Cowell thereafter instituted the two present respective separate proceedings for certiorari. They urge three main contentions: (1) That the evidence failed to support the finding that decedent was their employee; (2) that the award against them violates the principles of res judicata, estoppel, and law of the case; and (3) that the award is unreasonable.

[1] The first contention cannot be sustained. The evidence established conclusively that petitioners, as well as the corporation, were employers of decedent. The ranch was owned jointly by petitioners and estate of Helen E. Cowell. As an accommodation to these joint owners, it was operated for them by the corporation. The corporation has the entire charge of the ranch. It kept a separate accounting of all ranch transactions. It sent checks to cover the ranch payroll. It sold all produce and cattle from the ranch in its own name. It made all purchases for ranch needs. It received no payment from the joint owners for these services. It paid over to the joint owners, the net profit realized from its management of the property. These facts were shown by the testimony of W. H. George and by the records of the corporation. They were uncontradicted. Mr. George testified directly that the corporation "operated the ranch as an accommodation for I. M. and S. H. Cowell," and that it did not participate in the profits. In short, the evidence showed without conflict that the corporation operated the ranch as agent of the joint owners thereof. Under such circumstances, the commission properly held both the agent and its principals liable as employers for benefits due under the compensation act. Act 4749, Deering's Gen. Laws 1931, vol. 2, p. 2272 as amended; Zurich General, etc., Co. v. Division, etc., 99 Cal.App. 767, 279 P. 473; Arbogast v. Richardson, 119 Cal.App. 316, 6 P.2d 98; Schneider on Workmen's Compensation Law, vol. 1, 2d Ed., § 22, p. 204.

[2] Petitioners' argument is directed to the point that neither the fact that they were joint owners of the ranch property, nor the fact that they were minority stockholders of the corporation, conferred jurisdiction upon the commission to hold them as employers of those hired by the corporation to work on the ranch. And in this connection, petitioner Isabella Cowell contends that her case is even stronger than that of petitioner Henry Cowell, in that the evidence shows that she took no active part whatsoever in the operation or management of the ranch, whereas Henry Cowell had been president of the corporation for some twelve years, and admittedly in that capacity, if not as an individual, he had had a hand in the hiring of the ranch foreman, and in the direction of the ranch affairs. These additional facts are really immaterial, as petitioners were not found to be employers solely because they owned the ranch property, or because they were stockholders of the corporation, or on the theory that the corporation was their alter ego, or on any theory of "unity of interest." It may be conceded that if the evidence had shown no more than that petitioners owned the property and had leased or loaned it to the corporation for ranch purposes, said ownership of the property constituting petitioners' only connection with or relation to the injured laborer, then the evidence would not have supported a finding that petitioners were employers. Neither would the evidence have justified such a finding if it had shown merely that petitioners owned stock of the corporation which was operating the ranch, said ownership of stock and of property constituting petitioners' sole connection with or relation to the injured laborer. The evidence here, however, showed a further direct connection between petitioners and the hiring of the injured employee. It showed that in fact petitioners not only owned the ranch property, but they also owned the ranch as a whole, operated it for profit, and employed the labor thereon by and through their agent, the corporation. The additional circumstance that petitioners were at the same time stockholders of their corporate agent has no particular significance. The essential facts are these: The corporation did not conduct the ranch for its own gain. It did not intermingle the ranch affairs and funds with its corporate affairs and funds. It did not share in the ranch profit. It managed the ranch without compensation as an accommodation to the owners, and it paid the profits of the enterprise direct to petitioners. These facts established between petitioners and the injured employee the usual relation which exists where an undisclosed principal has employed help through his duly authorized agent. In such case both the undisclosed principal and the agent are employers. Zurich General, etc., Co. v. Division, etc., supra.

[3] The second contention of petitioners, urging application of the doctrines of res judicata, estoppel, or law of the case, is likewise without merit. It is true that the original findings and award made on February 28, 1935, dismissed and discharged petitioners; that thereafter a petition filed by the corporation for rehearing before the commission, and an application to the District Court of Appeal for writ of

review, were both denied; that the further award of July 31, 1936, made during the life-time of the employee, also discharged petitioners; that no petition was filed thereafter by the employee to reopen the proceeding for good cause, or to alter, amend, or rescind the findings and award; and that the later applications of the widow and children were filed as new and separate claims. The several proceedings, however—those during the life of the employee and those had after his death—were all a part of the one cause of action arising from the compensable injury suffered by the employee.

The findings and awards made in favor of the employee were predicated upon his acceptance of the stipulation that the corporation was his employer and had assumed liability. At the hearings had prior to his death, the issue of whether petitioners as well as the corporation were employers, was dropped. So far as the present record shows, the issue was not raised thereafter by the corporation either by its petition for rehearing, or by its application for writ of review. Therefore the denial of writ of review did not establish the law of the case on the question. Neither were the findings and awards made during the life of the employee res judicata upon the subject of petitioners' status. This is so because the applications for death benefit made by the widow and children were filed well within the period during which the commission had continuing jurisdiction of the cause, to take further evidence or, upon due showing, to rescind, alter, or amend prior findings and awards. The commission committed no impropriety and no act in excess of jurisdiction in entertaining the applications of the dependents, in rehearing the issues, and in rendering altered findings. To such procedure the doctrines of res judicata, and estoppel, are inapplicable. This is well settled. Great Western Power Co. v. Industrial Acc. Comm., 196 Cal. 593, 238 P. 662; Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195; Winthrop v. Industrial Acc. Comm., 220 Cal. 114, 29 P.2d 850; Market St. Ry. Co. v. Industrial Acc. Comm., 6 Cal.2d 344, 57 P.2d 499; Employers' Liability, etc., Corp. v. Industrial Acc. Comm., 7 Cal.App.2d 190, 45 P.2d 371.

[4] Petitioners were not injured by the failure of the commission to order that the corporation be joined as a party defendant in the matter of the minors' claim—an obvious oversight as the orders made by the commission plainly evidence its intention to consolidate the claims and to join all parties, i. e., petitioners, estate, and corporation, as defendants in the consolidated proceeding. The corporation, the only party which could have been injured by the omission, has never complained, but, on the contrary, it has hastened at every step of proceedings to assume liability, and to pay sums awarded as they fell due. This point can afford petitioners no relief.

[5, 6] The last contention of petitioners is that the award is unreasonable in at least two respects. First, petitioners complain that it fails to adjudicate the claim of the dependents against the estate of Helen E. Cowell, thereby depriving petitioners of their right of contribution from said estate. It will be noted that the commission, after joining the estate as a party defendant, neither discharged it, held it liable, nor mentioned it in the findings. The evidence showed the position of the estate to be identical with that of petitioners and for that reason it should have been held as an employer. Petitioners, having a right of contribution from the estate, were entitled to complain of this error. Hartford Acc. & Ind. Co. v. Industrial Acc. Comm., 8 Cal. 2d 589, 67 P.2d 105. However, they failed to raise the question in their application for rehearing before the commission, and therefore they are precluded from now urging it in these certiorari proceedings. Section 64(c), Compensation Act, supra; County of Los Angeles v. Industrial Acc. Comm., 109 Cal.App. 724, 293 P. 820; Great Western Power Co. v. Industrial Acc. Comm., supra. The petition for rehearing did contain a general allegation that "the award is unreasonable," but the argument in support of that allegation was not directed to the failure of the commission to find for or against the estate. The requirement of section 64(c), supra, is that an application for rehearing shall set forth "in full detail" the grounds upon which an applicant considers an award unjust, and "every issue to be considered," and that the applicant "shall be deemed to have finally waived all objections, irregularities and illegalities concerning the matter" not set forth in his application. By virtue of this provision petitioners must be deemed to have waived the contention.

[7] The other respect in which petitioners contend that the award is unreasonable is that they claim it subjects them, as uninsured employers, to a possible civil ac-

tion and imposition of penalties, section 29(b) of the act, supra,—and this despite the fact that the award is actually being paid, and the requirements of the act were substantially satisfied because payment of compensation to ranch labor was secured by the corporation's certificate of self-insurance. This situation, of course, affords no sound basis for annulment of the findings and award. Indeed, it would have been more satisfactory for the determination of the dependents' rights had a copy of the corporation's application for self-insurance, and the certificate issued thereon, been made parts of the record. These documents would, or should, show definitely the business which the corporation was authorized to conduct by virtue of its self-insurance certificate. However, in our view we do not deem it necessary to remand the cause for the above omission.

The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

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11 Cal.2d 168

HASSELL v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15209.

Supreme Court of California.

April 19, 1938.

1. Nuisance ⇨3(1)

The law relating to private nuisances is one of degree, and a use that would be reasonable under one set of facts may be unreasonable under another. Civ.Code, § 3479.

2. Municipal corporations ⇨323(3)

Evidence indicating that proposed convenience station to be erected by city of San Francisco on parkway in residential district would be conspicuous in appearance and cause disagreeable odors *held* to authorize enjoining construction of such station as a nuisance, in suit by owner of adjoining property. Civil Code, § 3479.

3. Municipal corporations ⇨323(3)

A judgment in suit by owner of adjoining property enjoining city from building public convenience station on parkway, but not enjoining building of underground station at same location, was proper as protecting property owner but permitting city to build station in manner consistent with nature of surrounding property.

4. Municipal corporations ⇨278(1)

The power given by charter provision empowering park commission of city of San Francisco to erect and to superintend erection of buildings may not be exercised so as to create a nuisance. Charter of San Francisco, § 41; Civil Code, §§ 3479, 3482.

5. Municipal corporations ⇨268

The authority given by San Francisco Charter "to erect and to superintend the erection of buildings" is not "express authority" to erect public convenience stations, within statute providing that nothing done "under the express authority of a statute" can be deemed a nuisance. Charter of San Francisco, § 41; Civil Code, §§ 3479, 3482.

[Ed. Note.—For other definitions of "Express Authority," see Words & Phrases.]

6. Nuisance ⇨6

Statutory sanction cannot be pleaded in justification of acts that by general rules of law constitute a nuisance, unless such acts are authorized expressly or by necessary implication, showing that Legislature contemplated the very act which occasions injury. Civil Code, § 3482.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Karl Hassell against the City and County of San Francisco and others, to enjoin the construction of a public convenience station. From a judgment for plaintiff, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondent.

EDMONDS, Justice.

The City and County of San Francisco has been enjoined from constructing above the surface of the ground a public convenience station in Marina Park. The trial court, in effect, found that if the building were constructed in the manner proposed it would be a nuisance. This finding is challenged by the city, which contends that it is not supported by the evidence.

Marina Park is a strip of land about a block wide and five blocks long. It is bordered on the north by San Francisco Bay and on the south by Marina boulevard, a public street. The respondent owns residential property of substantial value located on Marina boulevard and almost directly opposite the site of the proposed building. The area has been zoned as a first-class residential district.

As planned by the city park commission of San Francisco the building would be 70 feet long, 18 feet wide, and would stand about 12 feet above the surface of the ground. Its position in the park would be wholly within the prolonged lines of Fillmore street, which extends southerly from Marina boulevard. The site chosen is approximately 120 yards from the respondent's property.

[1, 2] In determining whether a present or proposed use of property is a nuisance, many factors must be considered. "The law relating to private nuisances is one of degree. A use that would be reasonable under one set of facts might be unreasonable under another." McIntosh v. Brimmer, 68 Cal.App. 770, 777, 230 P. 203, 204. See note to Motoramp Garage Co. v. Tacoma, 42 A.L.R. 891. Although the extent to which the proposed building would be "indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life, or property" section 3479, Civ.Code, cannot be definitely measured, a number of witnesses testified that the structure would substantially depreciate the value and desirability not only of plaintiff's property, but also of all the property similarly situated along Marina boulevard. As the only building along a narrow strip of parkway it would draw unusual attention, no matter how artistic its design and construction might be. It was further shown that unsanitary conditions usually prevail in such buildings, resulting in disagreeable odors which would sometimes blow across the park toward the respondent's home. This evidence, considered as a whole, sufficiently shows that a building erected at the place and in the manner proposed would be a nuisance, and supports the findings of the trial court. Therefore, unless the appellant can show that in appraising the consequences which would result from the maintenance of the convenience station as it is now planned, the rights of the city have not been adequately considered and protected, the judgment should be affirmed. Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733; McIntosh v. Brimmer, supra.

[3] In this connection it should be noted that the city has not been enjoined from building a convenience station underground at the same location. Conceding, therefore, that one is needed at the location selected, it appears that the only question at issue is whether the city may build it according to present plans or must place the new facilities underground. The evidence shows that the additional cost of underground construction is not prohibitive and that this method has been adopted by the city in other parks. The judgment, therefore, gives the property owner the relief to which he is entitled, and allows the city to install its facilities under conditions consistent with the character and use of the surrounding property.

[4] The charter of San Francisco grants to the park commission the exclusive control and management of parks, including the exclusive right "to erect and to superintend the erection of buildings". Section 41. Appellant argues that the authority thus given is not subject to judicial interference or revision. However, it may not be exercised in such manner as to create a nuisance. Lind v. City of San Luis Obispo, 109 Cal. 340, 42 P. 437; Peterson v. City of Santa Rosa, 119 Cal. 387, 51 P. 557; Adams v. City of Modesto, 131 Cal. 501, 63 P. 1083; Humphrey v. Dunnells, 21 Cal.App. 312, 131 P. 761.

[5, 6] Appellant also relies on section 3482 of the Civil Code, which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." However, the authority for the construction of the new building is not express. People v. Glenn-Colusa Irr. Dist., 127 Cal.App. 30, 36, 15 P.2d 549; People v. City of Reedley, 66 Cal.App. 409, 413, 226 P. 408. "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and

most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." 46 Cor.Jur., p. 674.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; HOUSER, J.; LANGDON, J.; SEAWELL, J.

PORTER et ux. v. HOFMAN.[*]

Civ. 5943.

District Court of Appeal, Third District, California.

April 22, 1938.

Rehearing Denied May 21, 1938.

Hearing Granted by Supreme Court June 21, 1938.

1. Automobiles 🔑181(1)

A motorist is guilty of "willful misconduct," so as to be liable to his guest, when he intentionally does something in operating automobile which should not be done under circumstances disclosing knowledge, express or implied, that injury to guest will be a probable result.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles 🔑181(1), 201(1)

To be guilty of "willful misconduct," and hence liable to guest in automobile, act of motorist constituting proximate cause of guest's injuries must be attributable to disregard of probable consequences and not to a lack of care.

3. Automobiles 🔑181(1)

The failure to exercise proper precaution or failure to exercise proper judgment in operating automobile constitutes "negligence" only, and not "willful misconduct" for which motorist would be liable to his guest.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

4. Automobiles 🔑181(1)

To be guilty of "willful misconduct," and hence liable to guest in automobile, motorist's knowledge that injury will probably result from manner of operating automobile may be actual, or motorist may be charged with knowledge when operation of automobile must probably result in injury.

5. Automobiles 🔑181(1)

"Willful misconduct," for which motorist is liable to his guest, like "negligence," must relate to time, place, person and surrounding circumstances, and must be measured thereby.

6. Automobiles 🔑245(24)

Ordinarily, whether motorist exercised judgment or any degree of caution or whether he drove in utter disregard of probable injury to his guest, so as to be guilty of "willful misconduct" and liable for injury to guest, is a question of fact for court or jury.

7. Automobiles 🔑181(1)

An intent on the part of a motorist to injure his guest is not a necessary element of "willful misconduct," for which motorist is liable to guest.

8. Automobiles 🔑181(7)

A motorist who, while driving at least 45 miles per hour down 6 per cent. grade on wet slippery pavement, turned almost completely around in her seat to look at occupants of rear seat, resulting in automobile leaving highway, proceeding over 130 feet in rough depression, and turning end over end on striking obstruction, was guilty of "willful misconduct," and hence liable for injuries to her guest.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

Action by Ed Porter and wife against Nanette Hofman for injuries sustained by the wife while riding as a guest in an automobile driven by defendant. From a judgment for plaintiffs, defendant appeals.

Affirmed.

H. L. Preston and Lilburn Gibson, both of Ukiah, for appellant.

Charles Kasch, of Ukiah, for respondents.

PER CURIAM.

In this action brought to recover damages arising out of an accident to a guest in an automobile, the trial judge prepared and rendered an opinion which, from an examination of the entire record, fully and fairly discusses the facts involved, and also sets forth a correct analysis of the law applicable thereto. For that reason the opinion of Hon. Benjamin C. Jones, the trial judge, is adopted as the opinion of this court:

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[*] For subsequent opinion see 85 P.2d 447.

"This is an action to recover damages for injuries sustained by Mrs. Porter while riding as a guest in an automobile owned and operated by the defendant. The action is predicated on alleged willful misconduct by the defendant in the operation of her automobile.

"The accident occurred on April 21, 1936, a few miles south of Ukiah on the state highway at a place commonly known as the Burke hill. Mrs. Hofman and Mrs. Porter had been to San Francisco. Mrs. Hofman's son, a boy eight years old, and a young man, a common acquaintance, were riding in the back seat of the car, a Pontiac two-door sedan. It had been raining, and, although the visibility was good, the highway was wet and slippery. The highway at this place is surfaced with an oiled surface 20 feet in width with graveled shoulders, that on the easterly side where the car left the road being approximately 2 feet wide. For some distance, back, or southerly, from where the car left the highway, the roadway is straight for a considerable distance, rising at a grade of approximately 6 per cent. The car left the highway at about the foot of this grade, and at about where it again commences to ascend to the north. At the bottom of the depression a creek crosses the highway over which there is a concrete bridge.

"After the car left the highway, it proceeded northerly in a depression along the easterly side thereof for a distance of over 130 feet, struck some kind of an obstruction, somersaulted, and came to rest on its wheels headed in a southeasterly direction. Mrs. Porter was thrown from the car when it turned end over end, sustaining severe spinal injuries.

"The evidence is undisputed that, as Mrs. Hofman was proceeding down the hill referred to, she took her eyes from the road and turned to look about her son and the young man in the rear seat. In the language of Mrs. Porter, she not only looked to the rear, but turned around and to the extent of a 60 to 70 per cent. turn to the rear. Immediately thereafter the car left the highway with the consequences above stated.

"The injuries to Mrs. Porter are not disputed, and the question presented is whether willful misconduct exists.

[1] "Willful misconduct is defined as intentionally doing something in the operation of a motor vehicle which should not be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.

"Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.2d 988; Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292; Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520.

[2] "The act constituting the proximate cause must be attributable to disregard of probable consequences, and not to a lack of care. Hall v. Mazzei, 14 Cal. App.2d 48, 57 P.2d 948.

[3, 4] "Failure to exercise proper precaution, or failure to exercise proper judgment in the operation of a motor vehicle, constitutes negligence only. To constitute willful misconduct, there must be a disregard of probable consequences, or a knowledge on the part of the driver that injury to a guest will probably result from the manner of the operation of the vehicle. In willful misconduct the knowledge upon the part of the driver that injury will probably result from the manner of operation of the vehicle may be actual, or the driver may be charged with such knowledge when the operation of the vehicle is in such a manner under the circumstances that it can be no other than that which will probably result in injury. Edwards v. Bodenhamer, 7 Cal.App.2d 305, 46 P.2d 202; Sanford v. Grady, 1 Cal.App. 2d 365, 36 P.2d 652, 37 P.2d 475.

[5, 6] "Willful misconduct, like negligence, must relate to the time, place, person, and surrounding circumstances, and must be measured by them. Ordinarily, it is a question of fact for the court or jury to determine whether the driver of a motor vehicle exercised judgment or any degree of caution in the manner of his driving, or whether he drove his vehicle in utter disregard of probable injuries to his guest. Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948; Gieselman v. Uhlman, 7 Cal.App.2d 409, 45 P.2d 819.

"Numerous cases have been cited to the effect that driving at a high rate of speed on a wet pavement, on curves, at intersections, and in overtaking other vehicles, was done in the exercise of a mistaken judgment resulting in disastrous consequences, and constituting negligence only. Other cases have also been cited showing lack of proper care or mistaken judgment resulting in injuries or death wherein recovery was not permitted on the ground of willful misconduct. Among these is the case of Bartlett v. Jackson, 13 Cal.App.2d 435, 56 P.2d 1298, where the driver who, proceeding along a straight and level highway in clear weather, took his eyes from the road momentarily to adjust his sleeping companion's head on the seat beside him and collided with a vehicle approaching from the opposite direction.

"On the other hand, in Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, it is held that it was willful misconduct for a driver to proceed at a high rate of speed on a wet and slippery pavement where the driver could not see on account of rain and water on the windshield accumulating thereon by reason of a defective windshield wiper.

"In Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430, it is stated that one who, while driving an automobile, knowingly flirts with danger, and without necessity or emergency compelling him, takes a chance on killing or injuring himself or others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct.

"In Frank v. Myers, 16 Cal.App.2d 16, 60 P.2d 144, it is held that the driver of a car on a city street who turned her head to the rear with the result that the car driven by her collided with one at the curb, injuring her guest, was not free from willful misconduct as a matter of law.

[7] "On the one hand we have held in the case of Bartlett v. Jackson, that it was not willful misconduct for the driver of a motortruck to take his eyes from the road upon a straight level highway in clear weather in the face of on-coming traffic to adjust the head of a sleeping companion upon the seat beside him, and upon the other hand in the case of Frank v. Myers that the driver of an automobile upon a city street was not free from willful misconduct as a matter of law when she turned her head to the rear to converse with other occupants of the car. A situation somewhere between these two cases must designate the line marking the difference between negligence and willful misconduct. An intent to injure the guest is not a necessary element.

"In this case the driver of the automobile was proceeding down a 6 per cent. grade at a rate of speed of at least 45 miles per hour, on a wet and slippery pavement, and, under the circumstances, turned almost completely around in her seat with no observation whatever of the road ahead of her. At the time the car left the road she was not even making an attempt to observe its course ahead. The fact that it proceeded over 130 feet in a rough depression along the side of the highway, and upon striking an obstruction turned end over end, is evidence of an excessive speed. The inference is that the car must have traveled a considerable distance between the time she turned to look to the rear and before the car left the highway. No careful and prudent person would have endeavored to drive down the grade in question, wet and slippery as it was, at 45 miles per hour without his eyes on the road. Such conduct would have been negligence. In fact, there is evidence in the record that Mrs. Hofman was careless in her driving from the time she left Healdsburg where the rain commenced. In addition to this, without necessity or emergency compelling her, she knowingly and intentionally turned in her seat and left the automobile to take its course with the inevitable consequences.

[8] "With her back turned to the direction in which the car was proceeding, it can hardly be said that she was exercising any judgment as to where or how her car proceeded. Likewise, no room was left for the exercise of any degree of care or caution in her driving. A reasonable person unquestionably would say that the defendant should have known that to turn around in her seat as she did under the circumstances and conditions surrounding the progress of her car would not only probably, but inevitably, result in injury to all the occupants of the car. The only conclusion to be reached is that her actions amounted to willful misconduct."

For the foregoing reasons, the judgment is affirmed.

26 Cal.App.2d 135

PEOPLE v. LIM DUM DONG.

Cr. 1614.

District Court of Appeal, Third District, California.

April 26, 1938.

1. Criminal law ⚷53

Under statute, a temporary aberration of the mind caused by voluntary intoxication induced by excessive use of liquor or narcotics is not a valid defense to a charge of crime, but to relieve one of responsibility it is necessary to prove that the brain has become permanently affected thereby. Pen. Code, § 22.

2. Assault and battery ⚷91

In prosecution for assault with a deadly weapon, it was not necessary to specifically prove that accused intended to injure the person injured by firing a revolver at her.

3. Criminal law ⚷354

In prosecution for assault with a deadly weapon, evidence of the inordinate use of narcotics by accused was competent under plea of insanity to determine whether use of drugs was voluntary, not taken for medical purpose, and whether use created a permanent derangement of the mind and not a mere temporary aberration thereof. Pen. Code, § 22.

4. Criminal law ⚷354

The statute limiting the purpose for which evidence of voluntary intoxication may be considered by jury applies alike to all forms of involuntary intoxication induced by the inordinate use of liquor or narcotics, and is applicable to temporary derangement of mind caused by the excessive use of morphine or cocaine. Pen.Code, § 22.

5. Criminal law ⚷494

Evidence of experts that accused was not afflicted with permanent, fixed, or settled insanity as result of habitual use of narcotics, that he was sane at time examined three months after commission of crime, and that at the time of shooting because of temporary effect of narcotics, which he had recently taken, he failed to see difference between right and wrong, sustained finding that accused was sane at time of shooting and was guilty of an assault with a deadly weapon. Pen.Code, § 22.

6. Criminal law ⚷773(2)

In prosecution for assault with deadly weapon where defense was insanity, requested instruction that accused was incapable of committing crime if he committed act charged without being conscious thereof was properly refused, since it omitted the necessary element of the consciousness of the nature of an act which is result of voluntary intoxication or temporary mental derangement caused by inordinate use of narcotics, and failed to indicate that lack of consciousness which would relieve accused of responsibility must have resulted from permanent insanity as distinguished from temporary insanity caused by voluntary use of narcotics. Pen. Code, § 22.

7. Criminal law ⚷773(2)

In prosecution for assault with a deadly weapon with defense of insanity, instructions regarding the issue of insanity *held* to fully and fairly present the issue.

8. Criminal law ⚷829(6)

In prosecution for assault with a deadly weapon with defense of insanity, instruction which omitted to base the conclusion on a condition of insanity, but declared that, if the defendant committed act without being conscious thereof, he must be found insane, was properly refused, in view of instruction given that, if defendant because of a settled disease of the mind did not know the nature of act with which he was charged or that it was wrong, he could not be held responsible for it.

◆

Appeal from Superior Court, Sacramento County; Dal. M. Lemmon, Judge.

Lim Dum Dong was convicted of an assault with a deadly weapon, and he appeals.

Affirmed.

Busick & Busick, and Charles O. Busick, Jr., all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Gordon S. Hughes, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was charged with the crime of an assault with a deadly weapon with intent to commit murder. By consent of court the offense was reduced to an assault with a deadly weapon. The defendant admitted that he shot Susie Yamagawa with a revolver, but pleaded that he was irresponsible for the act because he was then insane and therefore did not know the nature of the act which he performed. The question of the sanity of the defendant was tried with a jury. The jury rendered a verdict finding that the defendant was sane at the time of shooting. A motion for new trial was denied. From the judgment of commitment which was pronounced and from the order denying a new trial this appeal was perfected.

It is contended the verdict and judgment are not supported by the evidence; that the court erred in refusing to give to the jury a proffered instruction, and also erred in denying the motion for a new trial.

The defendant belongs to the Chinese race. He was addicted to the use of morphine and cocaine for some ten years prior to the time of the offense with which he was charged. It is apparent he used narcotics just before the shooting, which occurred September 29, 1937. A Japanese girl by the name of Susie Yamagawa, who was a total stranger to the defendant, was employed selling tickets in the box office of a Sacramento moving picture theater. No motive for the crime appears except that a witness testified the defendant brooded over the Oriental war which is now in progress between China and Japan, and that he said he knew of no reason why he should pay a Japanese girl for admission to a picture show. On the evening of September 29, 1937, he suddenly appeared at the box office, and, without uttering a word, he shot Susie Yamagawa with a revolver. He then shot himself with the same revolver. Both persons were taken to the receiving hospital and subsequently recovered.

Two reputable and experienced alienists, who were appointed by the court to investigate and report regarding the sanity of the defendant at the time of the shooting, testified that, as a result of the use of either morphine or cocaine shortly preceding the shooting, they were of the opinion he was then so temporarily deranged in mind that he was incapable of distinguishing between right and wrong, and that he did not then know the nature of the act with which he was charged, or that it was wrong to shoot the girl. Other witnesses testified to acts and conduct of the defendant, from which they concluded he was at least temporarily insane. The physicians testified that, when they examined the defendant three months after the shooting occurred, he was lucid and sane, and that he was only rendered temporarily insane for a short period after using morphine or cocaine in excessive quantities.

Dr. Burt F. Howard collaborated with Dr. Margaret Smythe, superintendent of the Stockton State Hospital in the examination of the defendant. Both agreed that the defendant was ordinarily sane and responsible for his conduct, but that he was temporarily insane at the time of the shooting on September 29, 1937, because of the effect of morphine or cocaine which he had been using at that time. In the course of their examination the doctors talked with the defendant, who told them of his habit of using narcotics for ten years past. Dr. Howard said: "When I examined this man [about three months after the time of the shooting], he seemed to be pretty clear mentally, he gave a pretty good story,—I saw no evidence of hallucinations or delusions at that time; in fact, he was able to tell me a good deal about his past life, and spoke English pretty well. * * * I thought he was under the influence of drugs [at the time of the shooting] to such an extent he didn't know what he was doing, either morphine or cocaine; he told me he used morphine for ten years, and had used cocaine too; so, he was a pretty definite case of narcotic user.

"Q. I take it your conclusion is, insanity only exists while he is under the use of narcotic drugs, * * *? A. That is what I concluded from my examination.

"Q. And any period of insanity, I take it, you found he went through on that evening of September 29th, was due to a recent use of narcotic drugs? A. I think so."

In addition to the use of narcotics, the defendant also told the doctor he was in the habit of drinking intoxicating liquor. He said the defendant told him, "He would take as much as ten glasses of Chinese gin a day." The jury, however, found that the defendant was sane at the time of the commission of the crime with which he was charged.

The question to be determined is whether this finding of the jury is supported by the evidence. It is clear from the evidence of the physicians that neither of them believed the defendant was afflicted with permanent, fixed, or settled insanity as a result of his habitual use of narcotics for a period of time long enough to have destroyed his faculties so as to render him irresponsible for his acts or conduct. Both alienists agree he was sane and rational at the time they examined him three months after the commission of the crime with which he was charged. But both expert witnesses testified that it was their opinion he was mentally irresponsible for shooting the Japanese girl, because of the temporary effect of narcotics which he had recently taken, and that he therefore then failed to appreciate the difference between right and wrong, and that he did not then know the act of shooting was wrong.

[1] Under the provisions of section 22 of the Penal Code the rule is well established in California that temporary aberration of the mind caused by voluntary intoxication induced by excessive use of liquor or narcotics is not a valid defense to a charge of crime. To relieve one of responsibility for the commission of an offense on the ground of voluntary intoxication from the effect of liquor or narcotics, it is necessary to prove that the brain has become permanently affected thereby. People v. Hower, 151 Cal. 638, 91 P. 507, 508; People v. Fellows, 122 Cal. 233, 54 P. 830; People v. Bremer, 24 Cal.App. 315, 141 P. 222; People v. Goodrum, 31 Cal.App. 430, 160 P. 690.

Section 22 of the Penal Code provides that: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

In the Hower Case, supra, in which a judgment convicting the defendant of the crime of an assault with intent to commit murder was affirmed, the court specifically disapproved an instruction to the effect that the jury must acquit the accused if they found that at the time of the offense his mind was so affected by the inordinate use of intoxicating liquor that he was then unable to tell what he was doing and that he was then not capable of distinguishing between right and wrong on that account. The court said: "It disregards entirely the question as to whether the intoxication was voluntary. * * * It was therefore in plain conflict with the provisions of section 22, Pen.Code."

Quoting with approval from the case of People v. Rogers, 18 N.Y. 9, 72 Am.Dec. 484, and People v. Travers, 88 Cal. 233, 239, 26 P. 88, the court further said in the Hower opinion: " 'There is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men, and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable, but if, by a voluntary act, he temporarily casts off the restraints of reasons and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society.' * * * 'It must be "settled insanity," and not merely a temporary mental condition produced by recent use of intoxicating liquor' " which will relieve one of the responsibility of his criminal act.

Our courts have strictly adhered to the foregoing salutary principle of law. That doctrine is settled. The decisions are uniform on that subject.

[2] In the present case, since the higher offense of an alleged assault with a deadly weapon with the intention of committing murder was withdrawn, and the defendant was merely tried and convicted of the crime of assault with a deadly weapon, it was not necessary for the prosecution to specifically prove the defendant intended to injure the Japanese girl by firing the revolver at her. People v. Gordan, 103 Cal. 568, 37 P. 534; People v. Marseiler, 70 Cal. 98, 11 P. 503; People v. Lopez, 81 Cal.App. 199, 253 P. 169.

[3] The evidence of the inordinate use of narcotics by the defendant in the present case was, however, competent and proper for the consideration of the jury under the plea of insanity to determine whether the use of the drugs was voluntary, not taken for medicinal purposes, and whether it had created a permanent derangement of the mind and not a mere temporary aberration thereof. Both alienists testified that the use of narcotics by the defendant resulted in mere temporary derangement of his mind and that it was not permanently affected thereby. They said it impaired his mind only "for a period of about fifty-two hours" and that he was lucid and sane when they examined him three months later. That evidence accords with the verdict of the jury, which determined that he was sane at the time of the commission of the offense. That verdict infers that the jury believed from the evidence that while the defendant's mind was temporarily affected by the use of narcotics at the time of the offense, it was, nev-

ertheless, the result of his own voluntary use of the drugs.

[4] Section 22 of the Penal Code, limiting the purpose for which evidence of voluntary intoxication may be considered by the jury, applies alike to all forms of voluntary intoxication whether it is induced by the inordinate use of liquor or narcotics. The same rule may be applied to temporary derangement of the mind caused by the excessive use of morphine or cocaine. People v. Sameniego, 118 Cal.App. 165, 173, 4 P.2d 809, 5 P.2d 653; 16 C.J. 110 § 88. In the authority last cited it is said: "If a person becomes temporarily insane through the voluntary immoderate use of morphine, cocaine, or other drugs, not taken as a medicine, his responsibility would clearly seem to be the same as that of a person drunk from the voluntary use of intoxicating liquors."

[5] The verdict and judgment of commitment were therefore not contrary to the evidence. There is adequate evidence to support them.

[6] The court properly refused to give to the jury the defendant's proposed instruction as follows: "You are instructed that if you find that defendant committed the act charged in the information, *without being conscious thereof*, then he was incapable of committing a crime; and your verdict should be that defendant was insane at the time the offense was committed."

As it was said in the Hower Case, supra, the preceding proffered instruction omits the necessary element of consciousness of the nature of an act which is the result of voluntary intoxication or temporary mental derangement caused by an inordinate use of narcotics. The instruction should have indicated to the jury that the lack of consciousness of the nature of the act which would relieve the defendant from responsibility must have resulted from permanent insanity as distinguished from temporary insanity caused by the defendant's voluntary use of morphine or cocaine.

The case of People v. Methever, 132 Cal. 326, 64 P. 481, 483, upon which the appellant relies in support of his contention that the court erred in refusing the foregoing instruction, is not in conflict with what we have previously said regarding that subject. In the Hower Case the judgment of conviction of the crime of murder, upon which the death penalty was imposed, was affirmed. It was contended the crime was committed while the defendant was suffering from delirium tremens. He pleaded insanity caused by excessive use of intoxicating liquor evidenced by his state of delirium tremens. He offered an instruction based on subdivision 5 of section 26 of the Penal Code, containing the admonition that if the jury found that he *"was not conscious of the act when he committed it,* * * * the jury must acquit the defendant." The above italicized language was stricken from the instruction. That modification was charged as erroneous. The court approved that modification of the instruction. It said:

"That subdivision 5 § 26 does not contemplate cases of unsound mind. * * * There is no reason why subdivision 5 should be given any broader construction; for, as to persons afflicted with unsound minds, subdivisions 2 and 3 include them all.

"It may be further suggested, in answer to the claim that the defendant did the act *while unconscious thereof by reason of his insanity,* that instructions covering every phase of the question of insanity, including that of delirium tremens, were presented to the jury, * * * and, where the defense is insanity, that is all the defendant is entitled to at the hands of the court. If the law excuses him for his acts under these circumstances, it is not by reason of his unconsciousness at the time the act is committed, but by reason of his insanity."

[7, 8] The preceding language, which was used in the Methever Case, fits the situation in the present case exactly. The only phrase of importance to the defendant in the instruction which was refused in the present case is almost identical with the one which was eliminated from the Methever charge. The circumstances with relation to that omitted phrase are similar in both actions. In this case we are of the opinion the jury was very fully and fairly instructed regarding the issue of insanity. Among other instructions which were given to the jury, at the request of the defendant, is the following one:

"The court instructs you that insanity means such a diseased and deranged condition of the mental faculties as to render a person incapable of distinguishing between right and wrong in relation to the act with which he is charged.

"If the defendant, at the time of committing the act with which he is charged, was laboring under such a defect of reason, from settled disease of the mind, temporary or otherwise, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong, he is not responsible therefor."

We are of the opinion the preceding charge substantially covers the only valid portion of the rejected instruction and that it is really more favorable to the defendant than the one which was refused. The preceding language charged the jury that if the defendant, because of a settled disease of the mind, did not know the nature or quality of the act with which he was charged, or that it was wrong, he could not be held responsible for it. The rejected instruction omits to base the conclusion on a condition of insanity, but declares that, if the defendant committed the act without being conscious thereof, he must be found insane. Of course, the unconscious performance of an act does not necessarily constitute insanity. A somnambulist may unconsciously perform an act in his sleep, but that is not evidence of insanity. The instruction in question was properly refused.

For the reasons heretofore assigned the motion for a new trial was properly denied.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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26 Cal.App.2d 89

PEOPLE v. McCOLLUM et al.

Cr. 1991.

District Court of Appeal, First District, Division 2, California.

April 21, 1938.

Rehearing Denied May 6, 1938.

Hearing Denied by Supreme Court May 19, 1938.

1. Conspiracy 🔑47

Evidence *held* to sustain conviction of conspiracy.

2. Criminal law 🔑877

In prosecution for conspiracy to maliciously injure property of complaining witness who was not a member of the union with which the accused were affiliated, fact that one of the accused was acquitted and the other convicted did not render the verdicts inconsistent in view of differences in facts.

3. Criminal law 🔑878(4)

In prosecution for assault and for conspiracy to maliciously destroy property, where accused and complaining witness were members of rival unions and accused threw bottle of creosote through window of front room in witness' house while witness was in rear part of house, fact that accused was acquitted as to assault and convicted as to conspiracy did not render the verdicts inconsistent. Pen.Code, § 240.

4. Criminal law 🔑427(5)

In prosecution for conspiracy to maliciously destroy property of complaining witness, where accused and complaining witness were members of rival unions, evidence was sufficient to show that conspiracy existed, that alleged coconspirators were members thereof, and that certain acts and declarations were in furtherance of the conspiracy, court properly admitted testimony concerning the acts and declarations of the alleged coconspirators.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

George McCollum and Eugene Carpenter were jointly charged with assault by means of force likely to produce great bodily harm and with conspiracy; Eugene Carpenter was convicted of conspiracy, and he appeals.

Affirmed.

Gladstein, Grossman & Margolis and Richard Gladstein, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

George R. Andersen, of San Francisco, amicus curiæ.

SPENCE, Justice.

Defendants McCollum and Carpenter were jointly charged in two counts. In the first count they were charged with assault upon George Martin by means of force likely to produce great bodily harm. In the second count they were charged with conspiracy in that they conspired together and with other persons to maliciously injure and destroy real and personal property of said George Martin and others. The overt acts alleged in the conspiracy count were the throwing of creosote upon the home of George Martin on March 4, 1937, and the driving in an automobile to the vicinity of the home of George Martin upon said date. Upon a trial by jury, both defendants were acquitted on the first count; defendant McCollum was acquitted on the second count; but defendant Carpenter was convicted on said second count. Defendant Carpenter's motion for new trial was denied and said defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

This case arises out of the struggle between two labor unions during the course of which struggle creosote was hurled onto and into the home of George Martin, a workman who had failed to join one union and was active in promoting the rival union. One of the main contentions of appellant is that the evidence was insufficient to support the verdict finding him guilty of conspiracy and we will therefore briefly set forth some of the evidence showing the events leading up to the actual creosoting of the Martin home.

The National Motor Bearing Company had a plant in Oakland. Prior to February, 1937, some few of its workmen were machinists and were members of the International Order of Machinists, a union affiliated with the American Federation of Labor. Most of its workmen then belonged to no union as they were not members of any craft having a union. In February, 1937, the United Auto Workers Union, being a so-called Committee for Industrial Organization union, started a campaign to enroll as members the employees of the National Motor Bearing Company. While this last-named union was nominally affiliated with the American Federation of Labor, it was under suspension. Leaflets were distributed to said employees announcing meetings and a number of said employees were enrolled as members. On the morning of February 27, the National Motor Bearing Company closed its plant, apparently fearing a "sit-down strike," but several of its old employees remained at work in the plant during the two weeks which followed. During that time and commencing on February 27, the United Auto Workers Union set up and maintained a picket line on the only street leading to the company's plant. Appellant, Carpenter, was a member of the last-mentioned union, and although never employed by said company, he joined the picket line.

Immediately following February 27, an effort was made to organize the company's employees into another union, sponsored by the International Order of Machinists and with a direct and unsevered connection with the American Federation of Labor. The complaining witness, George Martin, took an active part in organizing this union. This union entered into a contract with the company on March 1 and became chartered by the International Order of Machinists as Production Workers Union, Local 1518. The organization of this union was resented by the United Auto Workers Union and feeling ran high. Such feeling was manifested on the trial when one of the defense witnesses referred to said union as a "company union" and to its members as "scabs."

The evidence shows that appellant, Carpenter, and other members, including the officers of the United Auto Workers Union, were active in the affairs of the union and in directing the activities on the picket line during the race for enrolling members of the rival unions. It is entirely apparent that the plan and purpose of the picket line was to dissuade persons from working at the plant and from joining the other union and to persuade the employees to join the United Auto Workers Union. It is also a reasonable inference from the testimony, as indicated by the district attorney in his opening statement, that appellant, Carpenter, and others had agreed to induce said employees to join their union by lawful means wherever possible and by unlawful means, including threats of injury and injury to persons and property, whenever necessary. The record is replete with evidence from which this inference may be drawn and we will set forth some of the testimony regarding the acts and declarations of appellant, Carpenter, himself prior to the evening of March 4.

One of the employees testified that he had joined the United Auto Workers Union upon the representation that he would not be able to work unless he did join; that he visited the picket line in the first week in March and saw Mr. Slaby, the president of the union and also appellant, Carpenter; that Carpenter was writing down addresses and that he asked Carpenter what he was going to do with those addresses; that Carpenter replied, "If they don't join the union, we will dump them."

Another employee had joined said union and was a member of the picket line for about two weeks. He testified that he saw appellant, Carpenter, on the picket line the first two or three days and that he had been in two conversations in which appellant, Carpenter, took part. In the first conversation, there was general conversation about threatening some of the employees who were still working in the plant, including George Martin and his brother. Carpenter asked if any one knew the addresses of these employees. He said, "We are going to call on them." A few days later, being in the first few days of March, there was a second conversation in which it was stated that "there were a number of ways of persuading them not to work." Carpenter then suggested "that creosote was a fine, persuasive method of keeping anybody from working. * * * It did not come out of wood or plaster or anything of that sort. The material it was on would have to be removed; it could not be painted over or anything of that sort."

On the evening of March 2 a delegation consisting of Al Soderlund, secretary of the United Auto Workers Union; Jack Townsend, and others, called at the home of George Martin for the admitted purpose of persuading him to become a member of the United Auto Workers Union. Townsend, a witness for the defense, testified, "* * * he came to the door, he seen who it was and he seemed very nervous and afraid. He was afraid to come out on the porch. He said we were up there to beat him or do something." This delegation left two applications for membership in their union, one for George Martin and one for his brother, and told George Martin they would return the following evening to learn what the decision was. George Martin testified that one of the delegation told him that if he had not decided by the next night, "That they would not be responsible for what happened to him."

On the following night, March 3, a second delegation called, one of whom was recognized by Martin's sister as Roy Kristy. George Martin had instructed his sister to tell them he was not at home. She did so, but two or three cars paraded up and down in front of the Martin home all evening. On the following day, March 4, a tradesman, leaving the company's plant, was stopped by Kristy at the picket line and was asked who was working in the plant. The tradesman mentioned the name of George Martin and Kristy said, "George, we are going to get him." Townsend and Kristy were among those serving in the picket line on that day.

The creosoting of the Martin home occurred at about midnight on the night of March 4. The testimony showed that at about 9:30 on that night two men approached the front steps of the Martin home and looked at the address and then returned to an automobile. One of said men was identified as appellant, Carpenter, and the automobile was identified as that of defendant McCollum. The Martin house was the second house from the corner and the testimony showed that said automobile patrolled around the vicinity and was seen from the Martin house about eight or ten times between 9:30 and 11:30. Shortly before midnight the Martins left the living room at the front of the house and went to the kitchen at the rear of the house. At midnight they heard the crashing of the window of the living room, but when they arrived at the front of the house, they could see no one. The object which had been thrown through the window was a bottle of creosote. There were creosote stains both inside and outside of the house and three bottles, which had contained creosote, were found in front of the house, one broken and the others empty, but covered with creosote. During the days that followed, Townsend and others passed the house several times, staring at the house and laughing as they went by.

McCollum and Carpenter were apprehended and questioned. Carpenter admitted being with McCollum on that evening at the picket line at about 9 o'clock, but when asked what he had done after that, he replied, "I won't say what I done between that time and the time I arrived home," which latter time he then said was about 12 or 12:30. He was asked if he had handled any creosote during the past week and he said, "I won't say yes and I won't say no." He was asked if he left the picket line with McCollum that night and he replied, "I won't admit it and I won't deny it." He was asked if he and another man left the automobile on Sixty-second avenue, being near the Martin home, and he said, "I won't admit it and I won't deny it." When asked if he threw any creosote on the house of George Martin, he said, "The same answer goes."

McCollum answered quite freely when questioned and signed a written statement. His written statement was offered in evidence by counsel representing both defendants and was admitted without any request or order restricting or limiting its application. In this statement McCollum said that he received a telephone call at about 8 o'clock on the evening of March 4 from an unknown person stating that Carpenter wanted McCollum to meet him at Carpenters hall, where there was to be a meeting; that he drove there and picked up Carpenter and his wife and drove to the company's plant, where there were a number of pickets, including Slaby and Humphreys; that they went from there to a saloon and later returned to the picket line, where a man unknown to McCollum got in the car; that they then went to the soup kitchen and thereafter went driving around in the car on certain streets which it appears were in the vicinity of the Martin home; that they parked on some street between Sixty-second and Sixty-third avenues where Carpenter and the stranger got out and went around the corner; that they returned in about five minutes and Carpenter said, "Let's go"; that as they drove away one of the two men said, "Well, that's over with." In this written statement he said, "I had no knowledge to what these men were going to do, or their intentions were, but during the time we were together in the car I felt there was something suspicious about the whole thing. I did notice that Carpenter did have a bottle in his right coat pocket when he got out of the car after parking on the street between Sixty-second and Sixty-third avenues, where Carpenter told me to wait until he came back. There appeared to be an odor of lysol about him or coming from his person. When he reentered the car, there was a stronger odor of lysol about him. At no time did I arrange to take part in the creosoting of any house or take part in the violation of any law with these men. If any crimes were committed during the above period, I knew nothing of it."

Upon the trial both McCollum and Carpenter admitted being in the vicinity of the Martin home on the night of March 4 in the McCollum automobile. They further admitted that they stopped there and that Carpenter and a man unknown to either of them got out of the automobile, walked down the street and returned a few minutes later. It was claimed, however, that this was around 10 o'clock and that the purpose of the stop was to permit the men to answer a call of nature. In view of the other testimony in the record, the jury was justified in discrediting the last-mentioned portion of the testimony.

[1-3] From the foregoing summary of some of the testimony, we believe it is apparent that appellant's contention that the evidence was insufficient to support the verdict finding him guilty of conspiracy cannot be sustained. It was a reasonable inference from said testimony not only that a conspiracy existed and that appellant was a member thereof, but also that appellant was a moving spirit in said conspiracy and one of the persons who carried its plan into execution with reference to George Martin. The mere fact that McCollum was acquitted does not render the verdicts inconsistent, for it was charged that Carpenter, McCollum, and others entered into the conspiracy. It is probable that the testimony of McCollum and his statements made after his arrest caused the jury to entertain a reasonable doubt as to his complicity in the conspiracy. Nor does the fact that appellant Carpenter was acquitted on the first count render the verdicts inconsistent. The charge in the first count was that of assault upon the person of George Martin. It appears from the evidence that George Martin was in the rear of his home at the time the bottle was thrown through the front window and that he could not have been struck thereby. The jury, therefore, correctly acquitted on the first count. Pen.Code, § 240. But said acquittal was not tantamount to a finding that appellant did not throw a bottle of creosote at the Martin home, which was the first overt act charged in the second count.

[4] Appellant further contends that the trial court committed prejudicial error in its rulings on the admissibility of evidence. It would serve no useful purpose to set forth each of the specifications of alleged error. All of said specifications related to testimony concerning the acts and declarations of the alleged coconspirators. As the evidence was sufficient to show that the conspiracy existed, that the alleged coconspirators were members thereof, and that said acts and declarations were in furtherance of said conspiracy, we are satisfied that the trial court properly admitted such testimony. People v. Schmidt,

33 Cal.App. 426, 165 P. 555; People v. Gregory, 120 Cal. 16, 52 P. 41; People v. Collier, 111 Cal.App. 215, 295 P. 898.

Appellant further contends that the trial court committed prejudicial error in the giving and refusing of instructions. Appellant devotes but two pages of his brief to this subject. He set forth none of the instructions and cites no authority to sustain his position. His claim that it was error to refuse to advise a verdict of not guilty cannot be sustained in view of the fact that the evidence was sufficient to sustain the verdict of guilty. A reading of the entire charge shows that the jury was fully and fairly instructed and that the claims of error suggested by appellant are without foundation.

The judgment and the order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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26 Cal.App.2d 97

SMITH v. MALONEY.

Civ. 5817.

District Court of Appeal, Third District, California.

April 21, 1938.

1. Automobiles 🔑244(20)

In action for injuries sustained while riding as a guest in defendant's automobile, evidence sustained finding that defendant was under the influence of intoxicating liquor at time of collision at street intersection. St.1935, p. 154, § 403.

2. Appeal and error 🔑931(1)

The reviewing court was required to consider the evidence as a whole, adding all the reasonable inferences which might be drawn therefrom in determining whether automobile guest, who was injured in collision at street intersection, knew or should have known as a reasonable person that driver was intoxicated when she accepted invitation to ride as a guest. St.1935, p. 154, § 403.

3. Automobiles 🔑244(56)

In action for injuries sustained while riding as a guest in defendant's automobile, evidence that plaintiff had kept company with defendant almost daily for two months, that she knew his tendency to drink intoxicating liquor, that he was intoxicated in her presence a week prior to accident, that she drank considerable liquor with him on night of accident, and that she asked another to take her home partly because she knew of defendant's habit of drinking to excess, barred recovery on ground that plaintiff was contributorily negligent in accepting a ride when she knew or as a reasonable person should have known that defendant was intoxicated. St.1935, p. 154, § 403.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Virginia Smith against Martin Maloney for injuries sustained while riding as a guest in defendant's automobile. Judgment for defendant, and plaintiff appeals.

Affirmed.

Bradford, Cross & Prior and Elvin F. Sheehy, all of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against her on the ground of contributory negligence, in a suit for damages for personal injuries received in an automobile casualty while she was riding as a guest in the defendant's car. The complaint charged the defendant with liability for damages under the provisions of section 403 of the Vehicle Code, St.1935, p. 154, alleging that the accident was the result of his attempt to drive his machine while he was under the influence of intoxicating liquor.

The cause was tried by the judge sitting without a jury. The court found that the defendant was intoxicated at the time of the accident, and that the plaintiff accepted the invitation and rode in his machine as his guest, knowing that he was then intoxicated. Judgment was accordingly rendered against the plaintiff on the ground of contributory negligence. From that judgment this appeal was perfected.

This appeal presents only two questions: First, does the evidence support the finding that the defendant was intoxicated at the time of the accident? Second, does the evidence support the finding that the plaintiff knew, or as a reasonable person should have known, at the time she accepted the invitation to ride in the defendant's automobile as his guest, that he was intoxicated?

While there is a conflict regarding these issues, we are of the opinion both questions must be answered in the affirmative.

[1] The accident occurred at the intersection of L and Sixteenth streets in Sacramento, October 27, 1934, between 11 and 12 o'clock at night. Both the plaintiff and the defendant were then unmarried. They had been almost daily companions for two months. The plaintiff asked the defendant to accompany her to a buffet supper on Twenty-Second street in that city. The defendant had been playing tennis that afternoon. After completing the tennis game he visited the Pot & Spigot bar at about 6:30 p. m., in company with Mr. Newell, and drank two Scotch highballs. He then called for the plaintiff and they drove in his automobile to the buffet party on Twenty-Second street between T and U streets, where they arrived about 7 o'clock in the evening. During the progress of the party, in which some thirty or forty guests participated, the defendant drank four more Scotch or Bourbon highballs. About 10 o'clock the plaintiff and defendant, in company with two friends, drove in the defendant's car to the Tavern, where he drank two more glasses of liquor. They then returned to the party, and after bidding adieu to their hosts, they returned at about 11 o'clock to defendant's machine for the purpose of visiting the Senator Cocktail Lounge. They drove up Twenty-first street to its intersection with L street, thence westerly along L street to its intersection with Sixteenth street, where the collision with another machine occurred. The plaintiff testified that she had not particularly observed the defendant for that purpose before they started to drive to the Senator Hotel, but she had not noticed that he appeared to be intoxicated, yet before they reached P street, which was only five blocks from their starting point, she became convinced he was drunk. The defendant attempted to place his arm around the plaintiff. She protested and told him to "watch his driving." He laughed and increased the speed of his machine. When they reached L street, he made a right angle turn on to that street at the rate of 45 miles an hour. She said in that regard: "He would sort of zigzag from one to both sides; he would be on his right side, and sometimes he would be on the wrong side. * * * I think he wasn't paying any attention to his driving, and I thought he must have had too much to drink,—he must have, to drive that way."

The intersection light at Sixteenth street was blinking, but he paid no attention to the signal. He drove into that intersection at the rate of 50 or 60 miles an hour, colliding with another machine which was going south along Sixteenth street. The plaintiff and defendant were both thrown from his car. The plaintiff lay unconscious on her back in the street and the defendant was thrown across her body. Three witnesses testified that he arose and staggered away. Both of them were taken to the emergency hospital. One witness said he staggered around there, quarreling with others and acting peculiarly. The witness said that when he approached the defendant he thought he smelled the fumes of liquor on his breath. While there is a conflict of evidence regarding the defendant's intoxication, and several witnesses testified that he did not appear to be drunk when they left the buffet supper on their journey to the Senator Hotel, there is sufficient evidence to support the finding of the court to the effect that he was then intoxicated.

[2] The more important question remains as to whether the plaintiff knew, or viewed in the light of a reasonable person, should have known, at the time she entered his machine to go to the Senator Hotel, that he was then intoxicated. The plaintiff was very seriously, and probably permanently, injured. It is an unfortunate situation, but we are of the opinion the evidence sufficiently supports the finding that she knew, or should have known, that he was then drunk. In determining that question we should not only consider the evidence as a whole, but we must also add all the reasonable inferences that may be drawn therefrom. House v. Schmelzer, 3 Cal.App.2d 601, 40 P.2d 577.

[3] The plaintiff had been keeping company with the defendant almost daily for two months past. She had frequently seen him drinking. About a week before the accident occurred he became intoxicated in her presence. It is reasonable to assume she must have known he had been drinking before they attended the buffet supper that night. She knew that he drank liquor

at that party. During the progress of the party they, in company with two other companions, deliberately drove to the Tavern to procure other drinks. She saw him drink two highballs at that bar. In spite of the fact that he took her to the buffet supper at her own request, she sought to avoid returning with him and asked Mr. Nelson to take her home. She testified that this request was made of Nelson because the defendant had quarreled with her and she had decided not to keep company with him any more. Except for her testimony, there is no evidence of unfriendliness between them. She had not even told him of that intention. He did not know of it. He denied there was any unpleasantness between them. It is improbable that she would attempt to break their previous friendly relations in the midst of a party to which she had personally invited him. That is especially true since they had no quarrel at the party. It is a reasonable assumption that she asked Nelson to take her home because she realized the defendant was intoxicated to an extent that would render it dangerous for her to ride with him. When she was asked if she did not request Mr. Nelson to take her home, "because Martin Maloney was intoxicated," she replied: "I do not remember that at all. * * * I wasn't noticing very much." She, however, admitted that one of the reasons she intended to cease keeping company with him was because the defendant drank to excess. This colloquy occurred upon that subject:

"Q. Was that the reason you did not want to go out with him any more, * * * [that] he imbibed too much when you and he went out? * * * A. *That was one of the reasons,* and the other reason was we just could not agree. * * *

"Q. That was one of the reasons, he drank too much? A. Yes. * * *

"Q. One of the principal reasons? A. Yes."

The evidence in the present case that the plaintiff knew, or in the exercise of reasonable prudence should have known, when she entered the defendant's car to drive to the Senator Hotel, that he was intoxicated to a degree that rendered him incapable of safely operating the machine, is not strong, but it does sufficiently support the finding of the court in that regard. She had kept company with him almost daily for two months; she knew his tendency to drink intoxicating liquor; he was intoxicated in her presence a week prior to the accident; she drank considerable liquor with him that very night; and she asked another friend to take her home, partly because she knew of his habit of drinking to excess. In the case of House v. Schmelzer, 3 Cal.App.2d 601, 605, 40 P.2d 577, 579, it is said: "While an innocent person is entitled to protection from intoxicated drivers and to redress for injuries caused by them, one who accepts a ride under circumstances which should be a sufficient warning to any reasonable person that the driver is not in a fit condition to operate his car has no just cause for complaint when the law leaves him where he finds himself. In Jones v. Pacific Gas & Electric Co., 104 Cal.App. 47, 285 P. 709, the court said: 'Where one voluntarily participates in midnight festivities leading to the drunken condition of an automobile driver, the law does not permit such an one to shut his eyes to the hazards of riding with the intoxicated driver and in the event of injury following his careless and negligent driving, hold a third party responsible in damages.'"

To the same effect are the following authorities: 4 Blashfield's Ency. of Automobile Law, Permanent Edition, p. 246, § 2453; 5–6 Huddy's Ency. of Automobile Law, p. 261, § 143; Lynn v. Goodwin, 170 Cal. 112, 148 P. 927, L.R.A.1915E, 588.

In the case last cited it is said: "While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery * * * yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated, established independent negligence upon the plaintiff's part, apart from the driver's negligence, barring the right of recovery."

Many cases are cited in support of the preceding declaration of law.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

26 Cal.App.2d 119

NELSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10712.

District Court of Appeal, First District, Division 1, California.

April 26, 1938.

Hearing Denied by Supreme Court June 24, 1938.

Trial ⟹321½

Where eight jurors only, out of nine jurors that agreed to general verdict for plaintiff, agreed to special verdict favorable to plaintiff and necessary to validity of judgment for plaintiff, while tenth juror agreed to special verdict but not to general verdict, court properly refused to enter judgment for plaintiff and declared mistrial. Code Civ. Proc. § 618, as amended by St.1935, p. 1956.

◆

Proceeding by Oscar Nelson against the Superior Court of the State of California in and for the City and County of San Francisco, for writ of mandate to compel respondent court to enter judgment on verdict rendered in his favor in his action against J. A. Bried for malicious prosecution.

Writ denied and proceeding dismissed.

C. D. Dethlefsen and C. F. Eschwig, both of San Francisco, for petitioner.

Leo R. Friedman, of San Francisco, for respondent.

KNIGHT, Justice.

The petitioner, Oscar Nelson, seeks a writ of mandate to compel the respondent court to enter judgment in conformity with the verdicts of a jury rendered in his favor in an action brought by him against J. A. Bried for the recovery of damages for an alleged malicious prosecution.

The proceedings leading up to the application for the writ were these: Bried swore to a criminal complaint accusing Nelson of having stolen $825; and subsequently Nelson sued Bried for malicious prosecution. At the trial of the latter action, the jury was given a number of instructions upon the law of probable cause, wherein it was informed in substance, among other things, that before it could render a general verdict against Bried holding him liable for the payment of damages, it would be necessary for the jury to find as a fact that at the time he swore to the criminal complaint against Nelson he did not believe that Nelson had committed the theft with which he was therein charged; furthermore, the court stated that such issue of fact would be submitted to the jury in the form of a special verdict. Accordingly, the jury returned a special and a general verdict. Both were in favor of Nelson, the jury by its general verdict having assessed his damages in the sum of $4,500. A second special verdict, embodying another question of fact was also returned in Nelson's favor, but it is not here involved.

Upon the return of said verdicts, counsel for Bried requested that the jury be polled on each of said verdicts; and in response to the question propounded by the clerk to each of the twelve jurors as to whether each of said verdicts was his or her verdict, there were nine affirmative and three negative answers; whereupon the jury was discharged. Immediately thereafter counsel for Bried moved for an order setting aside the verdicts and declaring a mistrial. The ground of the motion was that only eight of the nine jurors who had joined in the general verdict had voted in favor of the special verdict upon which the general verdict was dependent. In this connection the poll revealed the following situation: Eight jurors voted consistently in favor of both verdicts, and two voted consistently against both verdicts; the eleventh member voted against the special verdict, but in favor of the general verdict; and the twelfth member voted in favor of the special verdict, but against the general verdict. Pending a determination of the motion the trial court withheld the entry of judgment; and later an order was made declaring a mistrial.

The question to be decided is, therefore, whether in a case such as this, where the rendition of a general verdict is made dependent upon the result of a special verdict, and each verdict receives the concurrence of only nine jurors, judgment must be entered pursuant to and in accordance with said verdicts, notwithstanding that it appears from the poll of the jury that only eight of the group of nine who voted in favor of the general verdict agreed to the special verdict.

Evidently there has been no previous ruling in this state upon the precise question so presented. But a situation which appears to be quite analogous to the present one was brought before the Supreme Court in the case of Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57, and the decision therein would seem to sustain the trial court's ruling herein. It was an action for damages for an alleged libel, and the jury returned two verdicts. The first contained a finding in plaintiff's favor on the merits, and assessed his compensatory damages in the sum of $25,000. Nine jurors concurred therein. The other was an award of punitive damages in the sum of $5,000, and ten jurors concurred therein. Judgment was entered in plaintiff's favor for the amount of both verdicts. But on the appeal it was held that the portion of the judgment founded on the verdict for punitive damages was void, because it appeared from the poll of jurors that such verdict had received the concurrence of only seven of the nine jurors who had agreed upon and returned the general verdict, upon which the verdict for punitive damages necessarily depended. In the case now before us, the poll shows, as stated, that only eight of the nine jurors who returned the general verdict against Bried concurred in the special verdict upon which the general verdict necessarily depended; and that being so, it would seem that under the ruling of the Times-Mirror Case, supra, the trial court was justified in holding that judgment could not be entered on the general verdict.

However, irrespective of the question of the controlling effect of the ruling in that case, the identical situation here presented has been definitely passed upon by the courts of the state of Wisconsin, which operates under statutory provisions similar to ours respecting the submission of special verdicts and the procedure to be followed upon the rendition of verdicts, including the polling of the jury; except that there ten members, or five-sixths of the jury, instead of nine, or three-fourths, as here, may return a verdict. And the doctrine there established and followed is substantially this: That while under the statutory provisions it is within the province of the jury to return any verdicts, general or special, upon which any ten of its members have agreed, the matter of the entry of judgment on the verdict so returned rests with the court; and that in such cases, if it appears from the poll of the jury that the ten members who have returned the general verdict declaring liability and awarding damages are not the same ten who have returned the special verdicts, and such special verdicts embody interrogatories, the answers to which are essential to establish liability and support a judgment, there is a mistrial, and judgment cannot be entered on said verdicts. Guth v. Fisher, 213 Wis. 323, 251 N.W. 223; Christensen v. Petersen, 198 Wis. 222, 222 N.W. 231, 223 N.W. 839; Will v. Chicago, M. & St. P. Ry. Co., 191 Wis. 247, 210 N.W. 717; Fraundorf v. Schmidt, 216 Wis. 158, 256 N.W. 699. The reasoning upon which the above doctrine is based is obviously sound, and there would appear to be no sufficient legal ground upon which its rejection here could be reasonably justified. In no other jurisdiction, so far as our attention has been called, has the point under consideration been decided.

The case of Bullock v. Yakima Valley Transportation Co., 108 Wash. 413, 184 P. 641, 645, 187 P. 410, from the state of Washington, cited by petitioner, does not touch the point at issue here, because it does not deal with the matter of entry of judgment. Nor is there anything stated therein which conflicts with the Wisconsin decisions. All that was held in the Washington case was that it was not error for the trial court to instruct the jury that it could return any special verdict upon which any ten of its members might agree. The decision did not purport to state the nature of the interrogatories embodied in said special verdicts, nor whether the answers to any of them were essential to establish liability. It does not even appear that the jury therein was polled; nor in fact is there any definite declaration in the decision showing that said special verdicts referred to therein did not receive the full concurrence of all twelve members of the jury.

Petitioner calls attention also to the concluding portions of section 618 of the Code of Civil Procedure, as amended by St.1935, p. 1956, which provide: "If upon such * * * polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case." And such being the law petitioner contends that the verdicts rendered herein were complete, because it affirmatively appears from the poll of the jury that not more than one-fourth disagreed therewith. The answer to this contention is to be found, we think, in the decision in the Times-Mirror Case, supra, wherein reference is made to this same code section, and the poll showed that the verdict awarding punitive damages had received the affirmative votes of ten jurors. It was held, nevertheless, that no judgment could be entered thereon because such verdict had been concurred in by only seven of the nine jurors who had returned the general verdict for compensatory damages upon which the verdict for punitive damages depended.

It is our conclusion, therefore, that under the facts stated and in view of the authorities above cited, the trial court acted within the scope of its judicial power in refusing to enter judgment in conformity with said verdicts and in granting the order declaring a mistrial.

The peremptory writ is accordingly denied, and the proceeding before us is dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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26 Cal.App.2d 49

DORRIS et al. v. CROWDER.

Civ. 1873.

District Court of Appeal, Fourth District, California.

April 19, 1938.

1. Appeal and error 🔑907(3)

A judgment for attorneys for reasonable value of services rendered in defending incompetent against charge of murder would not be reversed on ground that judgment was excessive, where appeal was on the judgment roll alone, and, in absence of evidence, appellate court would presume that there was substantial, competent, and material evidence before trial court supporting findings and judgment.

2. Attorney and client 🔑140

Where court is informed of nature and extent of attorney's services, court's experience furnishes it with every element necessary to fix value.

3. Insane persons 🔑74

While incompetent cannot make a valid and enforceable contract with an attorney, if incompetent engages an attorney who performs services for incompetent, attorney may recover reasonable value of services from incompetent's estate.

4. Criminal law 🔑641(3)

Under statute providing for appointment by court of counsel for an accused, it must appear that accused both desired counsel and that he was unable to employ counsel before trial court must appoint an attorney to represent accused. Pen.Code, § 987.

5. Insane persons 🔑74

As respects whether attorneys appointed by court to defend an incompetent charged with murder in first degree could charge him a fee when, after he had been found insane, it was discovered that he was possessed of an estate, trial judge was justified in disregarding incompetent's statement that he did not desire an attorney and his plea of guilty, where after trial incompetent was found to be insane. Pen.Code, § 987.

6. Insane persons 🔑74

Attorneys appointed by court to defend an incompetent charged with murder in first degree could charge such insane person a fee when, after he had been found insane, it was discovered that he was possessed of an estate of nearly $12,000. Pen. Code, § 987.

7. Insane persons 🔑62

An action by attorneys to recover reasonable value of services rendered in defending incompetent against charge of murder was not barred by statute providing that suit on rejected claim against an estate must be filed within three months, where, under statute, three-month period does not start running until date of service of written notice of rejection and there was nothing in record to show that any written notice of rejection was ever served on attorneys. Probate Code, § 714.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by W. C. Dorris and another against George Henry Crowder, an insane person, by J. H. Crowder, his guardian, to recover the reasonable value of services rendered by plaintiffs in defending defendant against a charge of murder. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Siemon & Claflin, of Bakersfield, for appellant.

W. C. Dorris, of Bakersfield, and H. E. Schmidt, of Bakersfield, in pro. per.

MARKS, Justice.

This is an action brought to recover the reasonable value of services rendered by plaintiffs in defending the defendant against a charge of murder. Plaintiffs had judgment and defendant has appealed.

Two of the three questions presented are novel and of first impression in California. They are: (1) Can attorneys appointed by the court to defend an insane person charged with murder in the first degree charge him a fee when, after he had been found insane, it was discovered that he was possessed of an estate of nearly $12,000.00? and (2) Do the provisions of the Probate Code, sections 705 to 714 inc., requiring a claimant to file a verified claim against the estate of a deceased person and to bring suit on a rejected claim within three months after written notice of its rejection, apply to claims against the estate of an incompetent person?

[1, 2] Defendant urges a third ground for reversal of the judgment, namely, that the $1,500 awarded plaintiffs for their services is excessive. There is no merit in this contention. The appeal is on the judgment roll alone. In the absence of the evidence, we must presume that there was substantial, competent, and material evidence before the trial court supporting the findings and judgment. Further, as said in Theisen v. Keough, 115 Cal.App. 353, at page 362, 1 P.2d 1015, 1019: "It is too well settled to require citation that the value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the nature and extent of such services, its own experience furnishes it with every element necessary to fix their value. Spencer v. Collins, 156 Cal. 298, at page 307, 104 P. 320, 20 Ann. Cas. 49."

We have been cited to and have found no case in California deciding the first question presented. There is dicta on the question in the old case of Rowe v. Yuba County, 17 Cal. 61, where it is said: "Besides, it is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties."

[3] It has been held that, while an incompetent person cannot make a valid and enforceable contract with an attorney at law, if he does engage an attorney and the attorney performs services for the incompetent, the attorney may recover the reasonable value of his services from the incompetent's estate. In re Estate of Nielsen, 111 Cal.App. 744, 296 P. 122. In Re Estate of Doyle, 126 Cal.App. 646, 14 P.2d 920, 921, it was said: "So far as the record in the instant case shows, no express contract was ever entered into by the appellant and decedent, and therefore sections 39 and 40 of the Civil Code, which refer to express contracts, are not applicable. Under the circumstances here presented, section 38 of the Civil Code: 'A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family,' may be invoked, in order to bind the estate of the incompetent upon a contract implied in law for the payment of necessaries, because we are inclined to the belief that services rendered by an attorney in an attempt to restore an incompetent to capacity should be classed as necessaries of life. Circumstances may well be imagined, where a guardian as well as members of the family of the incompetent turn a deaf ear to his urgent request that he be restored, and it would seem unjust to deny reasonable compensation to the attorney, who is instrumental in bringing such a situation to the attention of the court, in order that the status of the incompetent be determined." To the same effect are Fitzpatrick's Committee v. Dundon, 179 Ky. 784, 201 S.W. 339; McKee's Administrator v. Ward & Dickson, 38 S.W. 704, 18 Ky.Law Rep. 987; In re Freshour's Estate, 174 Mich. 114, 140 N.W. 517, 45 L.R.A.,N.S., 67, Ann.Cas. 1915A, 726; Carter v. Beckwith, 128 N.Y. 312, 28 N.E. 582; Rautenkranz v. Plummer, 75 Ind.App. 269, 130 N.E. 435.

Askey v. Williams, 74 Tex. 294, 11 S.W. 1101, 5 L.R.A. 176, is a case in which attorneys obtained judgment against an infant for a fee earned in defending him in a criminal case. In affirming the judgment the Supreme Court of Texas said: "The contracts of an infant for necessaries are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant, where he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace it a matter of far more importance to his welfare. It has accordingly been held that reasonable attorney's fees in defense of a criminal action brought against an infant are necessaries. Barker v. Hibbard, 54 N.H. 539, 20 Am.Rep. 160. See, also, Munson v. Washband, 31 Conn. 303 [83 Am.Dec. 151]. It follows that by his contract Lightfoot was bound to pay plaintiff the reasonable value of his services."

Defendant urges that, since plaintiffs were appointed by the court to represent defendant, their services were entirely voluntary and in performance of their duty to the court and that no implied contract to pay for their services can arise from such situation.

Section 987 of the Penal Code provides as follows: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

[4, 5] Under this section it must appear that a defendant both desired counsel and that he was unable to employ counsel before the trial court must appoint an attorney to represent him. In the instant case the defendant told the court he did not desire counsel and entered a plea of guilty to the charge of murder in the first degree. After the entry of the plea the trial judge appointed plaintiffs to represent him. The plea of guilty was withdrawn and pleas of not guilty and not guilty by reason of insanity were entered. After a trial defendant was found to be insane. He is now confined in an asylum.

Under these circumstances the trial judge was fully justified in disregarding defendant's statement that he did not desire an attorney. Defendant was insane and it became the duty of the trial judge to see that his legal rights were properly protected.

At the time plaintiffs were appointed as attorneys for defendant it was not known that defendant had property and was financially able to employ and pay counsel. It, however, was a fact that defendant was able to employ and pay his counsel. Thus one necessary element was lacking to place the obligation upon the trial judge to appoint counsel and to require that the counsel appointed defend the case without compensation. Defendant was possessed of means. Counsel should not be required to defend, without compensation, a man of means who is charged with a crime.

[6] Under the circumstances here presented, defendant should be held bound under an implied contract to pay the reasonable value of such services, he having been able to employ and pay counsel, having received the benefit of their services and counsel not being required by the provisions of section 987 of the Penal Code to represent defendant free of charge.

Defendant maintains that the provisions of section 714 of the Probate Code are made applicable to guardianship proceedings by section 1606 of the same Code; that plaintiffs' verified claim for their compensation was presented to the guardian on January 24, 1933, and was disallowed immediately thereafter; that the complaint in this action was not filed until December 20, 1933, more than three months after the rejection of the claim; that therefore recovery is barred by the provisions of section 714 of the Probate Code. From the view we take of the case it is not necessary for us to decide this interesting question.

The complaint charging defendant with murder was filed in the justice's court on December 21, 1931. A preliminary examination was had and he was held to answer. An information charging defendant with murder was thereafter filed in the superior court. In February, 1932, defendant was committed to the Mendocino State Hospital for the insane. J. H. Crowder was appointed guardian of his estate on March 21, 1932. Prior to that time he had no guardian.

Section 714 of the Probate Code provides in part as follows: "When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred."

[7] It will be observed that the section clearly provides that the three months with-

in which suit must be filed on a rejected claim does not start running until the date of the service of the written notice of rejection. There is nothing in the record before us to show that any written notice of rejection was ever served on either of plaintiffs. The trial court found that the cause of action was not barred by the provisions of section 714 of the Probate Code. As this is an appeal on the judgment roll, we must assume that the evidence supported this finding. If we assume, without holding, that section 714 of the Probate Code is applicable to guardianship proceedings, we must further assume that either no written notice of rejection of the claim was ever served or that, if one was served, it was served within three months of December 20, 1933, when this action was instituted. It follows that the finding to the effect that the cause of action was not barred by the provisions of section 714 of the Probate Code cannot be disturbed here.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

26 Cal.App.2d 124

PEOPLE v. YANT.

Cr. 3096.

District Court of Appeal, Second District, Division 1, California.

April 26, 1938.

Rehearing Denied June 15, 1938.

Hearing Denied by Supreme Court July 1, 1938.

1. Bail ⚷49

Evidence that since defendant's incarceration his health had been seriously impaired and that it was believed that his condition and injury to his health was such that it would be dangerously affected by further imprisonment was not sufficient to support application for admission to bail pending determination of defendant's appeal.

2. Bail ⚷44

An application for admission to bail pending determination of applicant's appeal, made after appeal, should be allowed only in cases where circumstances of an extraordinary character have intervened.

◆

Proceeding by Milfred R. Yant in the nature of an application for admission to bail pending a determination of the petitioner's appeal.

Application denied.

Eugene L. Wolver and David Coleman, both of Los Angeles (Louis Miller, of Los Angeles, of counsel), for appellant.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

This proceeding is in the nature of an application for admission to bail pending a determination of petitioner's appeal. It was commenced by a petition, general and formal in its terms, accompanied by an affidavit and a transcript of proceedings had at the time a similar application was made to the trial court following appellant's conviction. Points and authorities were submitted in support of the petition and the matter was orally argued and submitted. The affidavit and testimony contained statements concerning the effect likely to be wrought upon petitioner's health by his imprisonment. The only resultant statements in the affidavit and testimony are that since his incarceration appellant's health has been seriously impaired and that it is believed that his present condition and the injury to his health is such that it will be dangerously affected by further imprisonment.

[1, 2] The showing here made is utterly insufficient to support the application for admission to bail. Such an application, made after appeal should be allowed "only in cases where circumstances of an extraordinary character have intervened." Ex parte Marks, 49 Cal. 680. The only "circumstances" intervening since conviction, taking the entire case made by appellant, are disclosed by some of the statements contained in the affidavit concerning the state of his health, but that showing is insufficient. In Ex parte Turner, 112 Cal. 627, 45 P. 571, it was said: "There is nothing in the case showing the intervention of any such extraordinary circumstance as would justify holding that the application was improperly denied by the judge of the trial court. The evidence does not show that there is such imminence of dangerous results to the life or health of the defendant as to obviously require his removal from the county jail at this time." For a review of the authorities upon the question of the effect of confine-

ment upon health as requiring admission to bail pending appeal, see People v. Cornell, 28 Cal.App. 654, 153 P. 726.

In the instant case, should more serious consequences of his confinement hereafter manifest themselves, such as to render it proper that bail should be allowed, there is nothing to preclude another application for the purpose.

The application for admission to bail is denied without prejudice.

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26 Cal.App.2d 102

In re McCONNELL'S ESTATE.

McCONNELL v. HIRST et al.

Civ. 11712.

District Court of Appeal, Second District,
Division 1, California.

April 22, 1938.

1. Courts 🔑37(2)

The question of jurisdiction may be raised at any stage of a proceeding.

2. Insane persons 🔑33(1)

In proceeding for appointment of guardian of alleged incompetent's person and estate, petition is not subjected to test given to complaints in actions at law, and need only inform court that it should interfere for protection of person dependent on it for protection. Probate Code, § 1460, § 1461, as amended by St.1935, p. 1838.

3. Insane persons 🔑12

A petition alleging that alleged incompetent was 90 years of age, and was suffering from cataracts, arteriosclerosis, and senile mental deterioration to an extent that deprived him of the ability to manage his affairs and property, was sufficient to give court jurisdiction to determine whether guardian of alleged incompetent's person and estate should be appointed. Probate Code, § 1460, § 1461, as amended by St.1935, p. 1838.

4. Insane persons 🔑33(1)

In proceeding for appointment of guardian of alleged incompetent's person and estate, where petition is presented which is sufficient to inform court that it should interfere for protection of person dependent on it for protection, court must hold hearing and take testimony, and then take such action as may be deemed necessary and proper. Probate Code, § 1460, § 1461, as amended by St. 1935, p. 1838.

5. Insane persons 🔑2

Evidence as to whether alleged incompetent was in fact incompetent supported order appointing guardian of his person and estate. Probate Code, § 1460, § 1461, as amended by St.1935, p. 1838.

6. Appeal and error 🔑1010(1)

The District Court of Appeal may not disturb findings of lower court on ground that they are not supported by evidence, unless able to conclude, as a matter of law, that there is no evidence at all to support such findings.

7. Insane persons 🔑4

As respects appointment of guardian of person and estate of alleged incompetent, an adult has the right to control his person and affairs, and such right should not be taken from him except on clear showing of statutory grounds warranting restriction of his liberty of action for his own protection. Probate Code, § 1460, § 1461, as amended by St.1935, p. 1838.

8. Insane persons 🔑33(2)

In proceeding for appointment of guardian of alleged incompetent's person and estate, evidence which is in substantial conflict is for trial court, and its conclusion, after weighing opposing testimony and considering different inferences which may be drawn therefrom, is not open to reversal. Probate Code, § 1460, § 1461, as amended by St.1935, p. 1838.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Proceeding by Wilmer A. Hirst and another for the appointment of a guardian of the person and estate of Emmet McConnell, an alleged incompetent person, contested by Emmet McConnell, by his guardian ad litem, H. E. Pownall. From an order appointing William A. Cochrane as guardian, contestant appeals.

Affirmed.

H. G. Simpson, of Pasadena, and L. R. Brigham and H. Elliot Pownall, Jr., both of Los Angeles, for appellant.

Merriam, Rinehart & Merriam, of Pasadena (Harvey M. Parker and Paul H. Marston, both of Pasadena, of counsel), for respondent William A. Cochrane.

WHITE, Justice.

After proceedings for that purpose duly had, Emmet McConnell was declared to be incompetent. From the order appointing William A. Cochrane guardian of his person and estate, McConnell has appealed.

Appellant's first contention is that the petition by which these proceedings were initiated is fatally defective, by reason of which the superior court was without jurisdiction to hear or determine the matter of his incompetency. The petition in question alleged, among other things, that Mr. McConnell was about 90 years of age; that he was suffering from cataracts, arteriosclerosis, and senile mental deterioration, "to an extent that deprives him of the ability to manage his affairs and property." Section 1461 of the Probate Code, as amended by St.1935, p. 1838, provides that any relative or friend may file a verified petition alleging that a person is insane or incompetent, while section 1460 of the same Code provides as follows: "Any superior court to which application is made as hereinafter provided may appoint a guardian for the person and estate or person or estate of an insane or an incompetent person. As used in this division of this code, the phrase 'incompetent person,' 'incompetent,' or 'mentally incompetent,' shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

[1-4] There was no demurrer to the petition on the ground of any indefiniteness or uncertainty therein or on any other ground, and it may be doubted whether the sufficiency of its averments can properly be raised for the first time on appeal. However, as the claim here made is based on alleged want of jurisdiction, and as the question of jurisdiction may be raised at any stage of the proceedings, we will not deny appellant's right to have the order reviewed upon the question of jurisdiction. Conceding that, viewed as a pleading in an ordinary action at law, the petition was possibly open to special demurrer on the ground of uncertainty or want of facts to support averments of mere conclusions, nevertheless, in proceedings of the character here involved, a petition is not subjected to the test given to complaints in actions at law. In re Tilton's Estate, 15 Cal.App. 244, 250, 114 P. 594. The allegations of the petition were sufficient to inform the court that it should interfere for the protection of a person dependent upon it for protection. That is all that is required. When this is done, the duty devolves upon the court to inform itself by holding a hearing and taking testimony, and then to take such action as may be deemed necessary and proper.

[5] The second point raised by appellant is as to the sufficiency of the evidence to justify the findings of the lower court. The court found: "That the said Emmet McConnell is eighty-nine years of age, is suffering from cataracts, arteriosclerosis, and senile mental deterioration to such an extent as to deprive him of the ability to manage his affairs and property and to make him a prey for artful and designing persons"; and "That the said Emmet McConnell is in need of a guardian to manage his affairs, property and person." There is testimony in the record of sufficient substantiality to give support to these findings. A medical specialist and expert in nervous and mental diseases testified that appellant was suffering from arteriosclerosis accompanied by definite senile deterioration; that this was accompanied by a memory defect, irritability, and poor eyesight; that the mental deterioration of appellant was permanent and would grow progressively worse. It was the opinion of this medical expert that appellant was not competent to manage his own affairs and was in danger of being imposed upon by artful and designing persons. This opinion was based, according to the expert's testimony, upon personal observation of the alleged incompetent and upon the physical and mental condition of the latter as the same was noted by the doctor at the time of his examination. The witness also gave various other grounds upon which he predicated his opinion that appellant was incompetent. Another physician, engaged in the general practice of medicine, testified that his examination of appellant disclosed a generalized arteriosclerosis, hypertensive heart disease, arteriosclerotic dementia, and cataracts on the eyes. This doctor also gave it as his opinion that the physical and mental condition of appellant would grow progressively

worse. Other witnesses who had known appellant for a long period of time testified that in recent times he seemed more or less forgetful in handling matters, and that, when appellant asked them if certain papers were in their custody and was informed they were not, he seemed hesitant about knowing just where the papers were.

[6] It would serve no useful purpose to set out in detail the testimony of appellant or the other witnesses. Regardless of the view this court might be inclined to take from a reading of the evidence as contained in the transcript, the trial court had the advantage of not only seeing and hearing all of the witnesses, but of observing appellant upon two different occasions and of cross-questioning him; and therefore the trial court was in far better position than we could be in determining the weight to give the evidence which was introduced and to determine the mental condition of the appellant. With the witnesses before it, testifying to the facts disclosed by the record, the court could very properly conclude that appellant's mental faculties were impaired to such an extent as to render him incapable of taking care of his property, and that he was likely to be deceived or imposed upon by artful or designing persons. The testimony of witnesses for the appellant at variance with that of the witnesses who testified in support of the petition for the appointment of a guardian merely raised a conflict in the evidence. Before we can disturb the findings of the lower court upon the ground that they are not supported by the evidence, we must be able to conclude as a matter of law that there is no evidence at all to support the conclusions arrived at by the trial court. In a case involving the question of the sufficiency of the evidence to warrant a finding of incompetency by the trial court, the Supreme Court said (In re Estate of Reed, 198 Cal. 148, 150, 243 P. 674): "'It is unnecessary to enlarge upon the rule, so long settled and so well known as to be axiomatic, that the findings of a trial court upon disputed issues of fact are not to be overturned on appeal, unless they totally lack the support of substantial evidence. That rule is as applicable to a case of this character as to any other. It requires us to uphold the assailed finding if there is in the record evidence, which, with the aid of all inferences reasonably to be drawn from it, tends logically to establish the conclusion embodied in the finding.' Matter of Coburn, 165 Cal. 202, 212, 131 P. 352."

[7, 8] We are not unmindful, of course, that an adult person has the right to control his own person and affairs, and that such right should not be taken from him except upon a clear showing of the statutory grounds warranting a restriction of his liberty of action for his own protection. But where there is any substantial conflict of testimony, the solution of that conflict must, in this class of cases, as in any other, rest with the trial court. The conclusion reached by that court, after weighing opposing testimony, and considering the different inferences which may be drawn from all the testimony, is not open to reversal on appeal. In re Estate of Schulmeyer, 171 Cal. 340, 342, 153 P. 233.

We find no prejudicial errors in the rulings of the trial court on questions of law which arose during the proceedings.

For the foregoing reasons, the order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

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26 Cal.App.2d 107

MULHOLLAND v. PARKER.

Civ. 6064.

District Court of Appeal, Third District, California.

April 22, 1938.

Rehearing Denied May 21, 1938.

Hearing Denied by Supreme Court June 20, 1938.

1. **Trusts 🔑35(1)**

A trust could not be declared in realty willed by husband who had executed an instrument of a property settlement with his wife whereby they agreed to convey property to each other and that each should convey property to their children reserving a life estate, where such agreement referred only to property which husband owned or possessed at the time of execution of agreement and record failed to show when property willed was acquired by husband.

2. **Evidence 🔑385**

The prohibition against oral testimony to vary terms of written agreement applies as well to wills as to other contracts. Code Civ.Proc. § 1856.

3. Evidence ⟹441(1)

In suit to have a trust declared in realty devised by husband who had agreed to convey property to wife as part of settlement agreement, oral testimony that prior to execution of agreement husband had said that, if wife would sign agreement, he would will everything he had to their children, tended to controvert, limit, and vary express terms of written agreement, and hence was inadmissible, where no mistake or imperfection of writing was put in issue, validity of agreement was not disputed, ambiguity did not appear, and there was no allegation of fraud or undue influence. Code Civ.Proc. § 1856; Civ.Code, § 1625.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Elizabeth Mulholland against Hattie Parker for the declaration of a trust in certain realty and directing conveyance thereof to be made to certain beneficiaries. From a judgment defendant appeals.

Reversed, with directions.

Shaw, Bailey & Poe, of Los Angeles, for appellant.

F. G. Smith, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment decreeing a trust in certain real property and directing conveyance thereof to be made to certain beneficiaries. From this judgment the defendant appeals.

The transcript shows that one Charles L. Mulholland (now deceased) and the plaintiff in this action were married sometime previously to, and on the 1st day of August, 1904, were husband and wife, living in Los Angeles county; that there were four children, the issue of said marriage; that marital difficulties arose which resulted in the preparation, execution, and delivery of a property settlement agreement and the execution of certain deeds of conveyance in accordance with the terms of the agreement. The agreement provided that the parties thereto should live separate and apart; also, provisions were made for their mutual maintenance, and also for the support and care of the children.

In accordance with the terms of the agreement Charles L. Mulholland deeded to the plaintiff certain real property, also certain personal property, and agreed to pay to, and did thereafter pay to the plaintiff the sum of $1,400. The terms of the agreement provided, and in accordance therewith Charles L. Mulholland deeded to the four children certain real property, reserving to himself a life estate therein; likewise, in accordance with the terms of the agreement, the plaintiff in this action conveyed a portion of the property deeded to her under the agreement to the four children heretofore referred to, reserving a life interest to herself therein, that is to say, each of the parties to the agreement deeded a portion of the property which they had received to the four children, reserving a life estate therein, leaving to each of the parties a portion of the property described in the agreement in the names of the respective parties, free from any of the conveyances or stipulations contained therein, as the separate property of the respective parties to the agreement.

On the 24th day of October, 1935, Charles L. Mulholland died, leaving a last will and testament, dated October 22, 1935. By the terms of this will a certain house and lot situate in the city of El Monte, county of Los Angeles, state of California, known as 337 Lexington avenue, and particularly described as lot 46 of tract 77, also a number of shares of the capital stock of the Consumers' Salt Company and a one-fourth of the royalties from a certain existing oil and gas lease on the 20-acre tract of land described in the will, also, a 1933 Plymouth sedan automobile, were devised to the defendant. All the rest and residue of his estate was devised to the three surviving children, the issue of the marriage of said Charles L. Mulholland and his wife, Elizabeth Mulholland, one of said children having preceded Charles L. Mulholland in death. This will was duly admitted to probate. It may be here stated that the house and lot in the city of El Monte, mentioned in the will, is not mentioned in the agreement of separation executed by Charles L. Mulholland and Elizabeth Mulholland on August 1, 1904, nor is any of the other property.

The action by the plaintiff is to impress a trust on the property just mentioned as having been willed to the defendant, Hattie

Parker, and to compel a conveyance thereof to the three surviving children referred to herein. The testimony as to the alleged trust upon which this action is based is as follows:

"Q. Now, at that time you signed this document, who were present? A. Mr. Gage and Mr. Foley.

"Q. Your husband and yourself? A. My husband and myself.

"Q. Now, just previous to the time you signed that particular document, what conversation was had, what was said between your husband and yourself? A. I said, 'You get too much and I get too little.' He said, 'If you will sign this I will will everything I have got to our children.'"

It will be noted that if a trust to convey property by will was established by the language above quoted, it referred only to property which Charles L. Mulholland owned or possessed at the time of the execution of the agreement. The language is, "everything I have got," not what he might possess at the date of his death.

Thereafter the agreement was signed and deeds executed by the respective parties making the conveyances to which we have heretofore referred.

The testimony to which we have referred was all admitted over the objection of the defendant, the admission of which is assigned as error on the ground that it tends to vary the terms of the agreement between the parties reduced to writing and thereafter signed.

[1] It is further urged that such oral statement, if made, was not collateral to, nor disassociated with, the subject matter of the agreement. The contentions of the appellant appear to us to be well taken. In the first place our attention has not been called to any testimony in the record showing when the property willed to the defendant was acquired by Charles L. Mulholland. This of course is a fatal defect, in that the testimony does not show any declaration on the part of Charles L. Mulholland which would justify the conclusion that there was any intent on his part that such property should be impressed with a trust.

[2] We come now to a consideration of whether the testimony alleged to create a trust was admissible in evidence under the provisions of section 1856 of the Code of Civil Procedure. That section provides that when the terms of an agreement have been reduced to writing, it is to be considered as containing all of the terms, and, therefore, as between the parties and their representatives, no evidence of the terms of the agreement, other than the contents of the writing, is admissible, except in the following cases: Where a mistake or imperfection is alleged; where the agreement is the fact in dispute; or to explain an ambiguity; or to establish illegality or fraud. The prohibition against oral testimony specified in the section applies as well to wills as to other contracts. In the instant case no mistake or imperfection of the writing is put in issue. The validity of the agreement is not disputed; no ambiguity appears in the instrument; there is no allegation of fraud or undue influence.

Section 1625 of the Civil Code reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." The agreement executed between Charles L. Mulholland and the plaintiff in this action distinctly sets forth the consideration leading to the execution of the agreement, as follows: "Whereas, unhappy differences have arisen and still continue to exist between said parties of the first and second part, in consequence of which they are unwilling to cohabit and live together as husband and wife, and said parties do not wish to resort to the courts for the determination of their marital differences: Now, therefore, said parties hereto, in view of said conditions, do hereby mutually agree and consent to an immediate separation, and said parties have mutually agreed and consented, and do hereby mutually agree and consent to alter their relations as to property, and in order more effectually to provide for their mutual maintenance, and the support and care of their said children, and in furtherance of this agreement, said parties have this day mutually executed separate conveyances, disposing of all of the community property acquired by said parties since their marriage, and now owned by them, and which is hereinafter specifically described."

Here follows a description of the property conveyed by the respective parties, each to the other, and also the property conveyed to the children, in which life estates were reserved as heretofore specified, and after mentioning the purpose of such conveyance for the support and maintenance of the children, we find the following: "Said party of the second part, in consideration of the premises, does hereby waive, release and relinquish all claims and demands of whatsoever nature or description in or to all or any of the herein described separate property of the party of the first part, and all claims and demands of whatsoever nature and character, in and to all of said property which said party may hereafter acquire, and to all earnings, profits and income of said party of the first part, and all rights of inheritance; provided, however, that said second party does not hereby waive any right of inheritance by reason of any future will which might be voluntarily made by said party of the first part, in favor of the said party of the second part."

A like provision in the agreement accords to the second party thereto the right to make a will devising property and retaining a corresponding privilege of inheritance.

It cannot very well be held that Charles L. Mulholland retained, and had the right, under the agreement, to will any or all of his property to Elizabeth Mulholland, the second party in the agreement and, also, that a valid trust to convey the same property to other parties existed at the same time.

[3] Following the oral declaration, if such declaration was made, the agreement, which negatived any limitation as to the power of either of the parties to devise their property by will, was signed. To hold that the oral declaration was admissible is to hold that the provisions of the agreement which we have set forth herein may be varied by oral testimony, in contravention of the sections of the Code to which we have referred. Both conditions as to the devising of property cannot exist, and therefore the subsequent condition contained in the writing subsequently signed must be held as excluding any testimony of the so-called oral agreement.

We may here refer again to the recitals of consideration found in the agreement, and the causes which motivated the parties in signing the same. There is no question that the agreement contains, fully, a recital of the considerations. In Arnold v. Arnold, 137 Cal. 291, 70 P. 23, 24, the subject of varying or adding or supplementing the express consideration by oral testimony is thus treated: "While the recitals of consideration in written instruments are not conclusive as to the amount, or character, or payment of the consideration, when these latter matters are the subject of litigation, evidence of want of consideration, or of a different consideration, is not admissible for the purpose of varying, contradicting, and defeating covenants by which rights are expressly vested."

To the same effect we may cite the annotation found in 70 A.L.R. beginning on page 752. In the agreement under consideration all of the considerations moving the parties to sign the same are fully set forth and the oral declaration mentioned in the testimony cannot be admitted as an additional consideration without likewise varying the terms of the written instrument.

The instant case is readily distinguishable from the case of Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189, and a number of cases cited by respondent as supporting the rules which governed the decision in the Brison Case. In that case we find that fraud constituted the basis of the action; that a declaration was made without any intent to perform. A number of cases involving the same question are cited, but these cases are not applicable here for the simple reason that no fraud or undue influence or mistake or ambiguity appears to be set forth in the record.

There are two factors determinative of this cause: First, that the oral testimony tends to controvert, limit, and vary the express terms of the written agreement; second, that the record fails to show when the property willed to the defendant was acquired by Charles L. Mulholland.

In view of what we have said, we see no reason for extending the length of this opinion by either citing or analyzing the various cases mentioned in the briefs.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the defendant.

We concur: PULLEN, P. J.; THOMPSON, J.

11 Cal.2d 263

SADA et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

S. F. 15957.

Supreme Court of California.

April 29, 1938.

1. Workmen's compensation ⚷1411

That a finding of the Industrial Accident Commission is supported solely by hearsay does not of itself invalidate finding or stamp proof as too unsubstantial to be credited.

2. Workmen's compensation ⚷1385, 1411

In proceedings before the Industrial Accident Commission, hearsay is admissible, and the weight to be given such evidence is a question for commission, and, if in its judgment it carries convincing force, it may be sufficient in itself to sustain an award.

3. Workmen's compensation ⚷1719

Whether decedent was hit in the head by a flying bowling pin while working temporarily as a pin setter, so that his death from a broken neck and pneumonia was compensable, or whether he was merely visiting in spectators' section of bowling alley and fell down from drunkenness and hit his head against a railing, was a question for Industrial Accident Commission under conflicting evidence.

4. Workmen's compensation ⚷1673

Evidence, including uncontradicted showing that decedent was not regularly employed as a pin setter in a bowling alley, and evidence that maximum average weekly earnings of pin setters did not exceed $14, did not support Industrial Accident Commission's award of death benefits to decedent's mother as a partial dependent on basis of earnings of $17.50 a week and average contributions to mother of $10 per week in addition to burial expense.

In Bank.

Proceeding under the Workmen's Compensation Act by Agnes M. O'Connor for the death of her son, Martial Hainque, employee, opposed by Battista Sada and Peter Dantoni, copartners doing business as the Loop Bowling Alley, employers, and the Pacific Employers Insurance Company, insurance carrier. The Industrial Accident Commission made an award to Agnes M. O'Connor as a partial dependent of the deceased employee, and the employers bring certiorari to annul the award.

Award annulled and cause remanded, with directions.

Hubbard & Hubbard, of San Francisco, for petitioners.

W. N. Mullen, of San Francisco, amicus curiæ for Pacific Employers Ins. Co.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

This proceeding in certiorari was instituted by petitioners Sada and Dantoni, copartners doing business as Loop Bowling Alley, to secure the annulment of an award made against them by the Industrial Accident Commission for the death of Martial Hainque.

The commission found that on March 7, 1937, Martial Hainque, while working as a pin setter for petitioners, sustained an injury which resulted in his death on March 10th, and that Agnes M. O'Connor, the mother of decedent, was a partial dependent, entitled to a death benefit of $1,560, and $150 for burial expenses. Petitioners challenge the sufficiency of the evidence to support (1) the finding of employment, and (2) the finding which fixes the amount contributed by decedent to his mother's support.

[1-3] On the subject of employment, the only support for the commission's finding, other than such inferences as may be drawn from the evidence as a whole, is certain hearsay testimony which was flatly contradicted by persons who witnessed decedent's alleged injury. The record shows that decedent was a pin setter who had been employed intermittently in various bowling alleys in San Francisco; that prior to 1937 he had worked for petitioners, but that he was an inveterate drinker, and frequent intoxication prevented any regular pursuit of his occupation. Admittedly decedent called at petitioners' bowling alley on the evening of March 7th, and there sustained an injury. The conflict of evidence concerns the manner in which the injury occurred—whether decedent was hit in the head by a flying pin while working temporarily as a pin setter, or whether decedent was merely visiting in the spectators' section of the alley, and fell down from drunkenness, hitting his head against a railing.

Petitioner Sada, John Koumas, the night manager of the bowling alley, and two pin setters regularly employed there, Black and Kelly, all of whom were at the alley on March 7th, and knew decedent, testified positively that decedent did not work on that evening, and was not injured while setting up pins; that on the contrary, decedent called at the alley about midnight in a condition of intoxication; that he remained in the spectators' section, and about 12:30 a. m. (March 8th), it was observed that he had fallen face downward just outside of the fence which surrounded the bowling lanes, with his head close to the fence railing; that it was thought that he was merely drunk, not injured; and that he was placed on a couch in another room to recuperate. Petitioner Sada stated that many times previously when decedent was drunk, he had been put in the back room to sleep for a night or two; that therefore when he (Sada) left for his home about 3 o'clock in the morning, he did not disturb decedent; that he returned to the alley about 10:30 a. m., and talked with decedent; that decedent said he felt "dizzy," but nevertheless walked to the bar, had a plate of soup, and then went back and lay down again; that about 4 o'clock in the afternoon, as decedent seemed to be getting worse, an ambulance was called and decedent was taken to the Harbor emergency hospital, where he was booked as an alcoholic but, upon diagnosis, was found to be severely injured, having sustained a fracture of the vertebra, or in common parlance, a "broken neck," with the complication of pneumonia.

Shortly after decedent's arrival at the hospital, about 5:20 o'clock of the afternoon of March 8th, Police Officer Jack W. Leishman called to investigate the case, and talked with decedent. Officer Leishman, when testifying before the commission in this proceeding, gave the following version of his conversation with decedent:

"At my arrival he (Martial Hainque) was on the table in the treatment room in a paralyzed condition * * * he stated to my partner and myself, who was Officer Guisto, that he received an injury about 8 p. m. on March 7th while setting up pins in the Loop Bowling Alley at 238 Columbus Avenue, and that he was asked to do so by Mr. Sada. * * * And I asked him if he was employed by Mr. Sada, or by the Loop Bowling Alley, and he said that he was from time to time, that whenever there was anything to do why he was, I understand, or he so made it clear to me, that he wasn't permanently employed, that he was sort of hanging around there and if there was anything to do why—in the line of setting up pins—if there was a job why he would get up and do it—that is he was in this particular case. I asked him if he was steadily employed and he stated 'No', but that he was asked to set these pins up by Mr. Sada on this particular occasion, and that was about eight o'clock Sunday night, which was March 7th, and he didn't remember very much that transpired between that time and the time that he was conveyed to the hospital. He was—he said that he laid down or was laid down on a couch or cot or something there at the bowling alley, and he was sent into the hospital. * * * He said that he was stooping over, setting up pins, when suddenly a bowling pin struck him in the head, and that he fell backward. * * * The only apparent abrasion that I noticed was a little abrasion on his forehead, that I can recall. He received no medical attention for anything in that line. * * * There was a slight odor of alcohol on his breath. * * *

"Q. When you talked to him, was his mind apparently clear? A. Yes, I would say that it was."

Dr. Joseph S. McGuinness, the hospital physician who examined decedent prior to the arrival of Officer Leishman, testified that decedent told him that the night before, while working in the pit of the bowling alley setting up pins, he had been struck by a pin on the back of the neck and suffered paralysis; that they had laid him down in the hall and kept him there all night. Dr. McGuinness expressed the view that at the time of this conversation decedent's mind was perfectly clear. He also testified, however, that he detected a strong odor of alcohol upon decedent.

Mrs. Agnes M. O'Connor, decedent's mother, testified that on March 9th the hospital telephoned that her son was seriously injured; that she went to him at once; that he was very ill, and she did not question him much, but that he stated he was hurt over in the bowling alley where he was working; that he was hit with a pin.

It will be noted that according to decedent's statements to the police officer and physician, he was injured about 8 o'clock in the evening, whereas the bowling alley people claimed that decedent did not arrive at the alley until about 12, midnight.

The statements of two other witnesses tended to corroborate the latter testimony. Mr. Reavis, the manager of the hotel where decedent was rooming, testified that he saw decedent leave the hotel about 11:30 with a Mr. Russell, and that decedent appeared to be sober. Mr. Russell testified that he first saw decedent about five o'clock in the afternoon, and that thereafter between that time and 11:30 in the evening he saw decedent at least four times, sitting in the hotel lobby; that at 11:30 he and decedent left the hotel together, and he walked with decedent as far as Market and Third streets; that decedent seemed to be sober, and said he was going to the bowling alley where he had been working.

Petitioners placed in evidence a book containing a record of the names and earnings of pin setters employed by them. Decedent's name did not appear in this record. However, it was admitted that the names of temporary pin setters were not always listed.

Testimony taken at the coroner's inquest was made a part of the record in this proceeding. This evidence added to the conflict of proof. One witness testified that decedent had told him that a month or two previously he had been struck in the back with a bowling pin during a fight in the Hub Bowling Alley (an alley not owned by these petitioners). The manager of the Hub Bowling Alley testified that some months previously he had employed decedent but had discharged him because he was drunk. There was medical evidence that decedent was suffering from an old injury, and not a recent fracture. In contradiction of the testimony of Dr. McGuinness that decedent had sustained a recent fracture of the vertebra, causing the development of paralysis within 24 to 48 hours thereafter, Dr. Leland, who examined decedent subsequent to his treatment at the emergency hospital, stated that he could not find any fracture; that he found merely hypermobility, and that the dislocation apparently had been reduced surgically because it was perfectly in line; that there was no bruising or other evidence of injury other than a skinned chin and forehead; that "with a spinal cord injury, you afterward develop paralysis below that level, and this man went ahead and developed a pneumonia which was the actual cause of his death"; and that a contributory factor was decedent's fatty enlarged liver, which was obviously due to alcoholism.

From this confusion of proof it will be noted that the hearsay testimony given by Officer Leishman, Dr. McGuinness, and Mrs. O'Connor, is the only evidence which directly supports the finding that decedent was injured in the course of his employment by petitioners; that, however, the commission credited this testimony and refused to believe the statements of the eye witnesses who testified on behalf of petitioners, all of whom were in a position to benefit by the prosperity of the bowling alley, or vice versa, particularly as petitioners had been unable to secure compensation insurance for that class of risk. Petitioners, in applying for a rehearing before the commission, offered newly discovered evidence, alleging that by continual inquiry they had succeeded in locating six persons who were in the bowling alley as visitors at the time decedent fell, and who could testify that decedent was intoxicated, and was not working. The commission refused to receive this testimony. While in one sense it might have been merely cumulative, in another sense, if credited, it might have carried sufficient weight to turn the case, in that it would have afforded a corroboration by disinterested spectators of the testimony of the bowling alley people.

A full review of this record leads us to agree with petitioners that the showing in support of the finding of employment is indeed meager, and to a reviewing court it seems that the trier of the facts might well have reached an opposite conclusion, or at least have permitted introduction of the proof proffered in the application for rehearing. However, under the rule which obtains in proceedings before the commission (27 Cal.Jur. § 149, p. 479), the fact that a finding is supported solely by hearsay does not of itself invalidate the finding or stamp the proof as too unsubstantial to be credited. Inasmuch as hearsay is admissible, the weight to be given such evidence is a question for determination by the commission, and if in its judgment the evidence carries convincing force, it may be sufficient in itself to sustain an award (27 Cal.Jur. § 152, p. 483). Because of this rule, and because the thrice told tale of decedent, as recounted by the police officer and physician—two disinterested witnesses who should have been well qualified to judge of decedent's mental condition—has some support in inferences which may be drawn from the evidence as a whole, we are reluctant to brand said proof as too unsubstantial or highly improbable to support the finding of employment. Despite this conclusion, however, the cause will have to be remanded, as will hereafter appear, due to the insufficiency of the evidence to support an award in the sum fixed by the commission. Therefore, in view of the condition of this record, and in fairness to petitioners, we think that upon the further proceedings before the commission, the cause as a whole should be reopened, and an opportunity should be accorded both sides to produce additional proof on all issues. It is hoped that a showing can be made which will establish to a greater degree of certainty the true fact of the matter of employment.

[4] The further contention of petitioners is that the commission erred in computing the amount which decedent contributed to his mother's support, and that the finding on this subject is without sufficient support in the evidence. This contention must be sustained.

The commission found, and the finding has support, that decedent's mother was partially dependent upon him. A partial dependent is entitled to a benefit, in addition to burial expense, fixed by statute at three times the annual amount devoted by the deceased to the support of such dependent, provided said amount does not exceed three times the average annual earnings of the deceased. 27 Cal.Jur. § 195, p. 542. The commission found that this decedent contributed to his mother annually the sum of $520 (an average of $10 per week); that she was therefore entitled to a death benefit of $1,560, in addition to burial expense; and that the payments were based on earnings of $17.50 a week.

The evidence showed conclusively that the commission was not warranted in basing payments to the partial dependent upon earnings fixed at so high a figure, and also that decedent's earning capacity could not have permitted him to make contributions to his mother to the extent found. It is true that the mother testified:

"Q. How much did he contribute to your support? A. Various sums. Some weeks $12.00; some weeks $10.00; some weeks $15.00, and so on.

"Q. How did he pay this to you? A. By the day. He gave it to me when he had little jobs places."

But the other evidence showed that decedent, after paying his own room rent and incidentals, could not have had left for contribution any such sums, and furthermore, that the money which he gave his mother was used in part for his own support, as he took three meals a day at his mother's apartment, and also had her do his laundry.

As a matter of fact, the evidence failed to show that decedent had had any regular employment whatsoever during a period of several months prior to his death. The only indication that he may have had some earnings during that time is found in the testimony of Mr. Russell, who stated: "He (decedent) told me he made from $2.00 to $3.00, sometimes more, a day * * * we talked a couple of times about it. I had set up pins and I couldn't see how he made quite so much money at it or anything, but he was laughing and joking and said he had lots of friends out there and everything, and he made more money by drinks than by setting pins." In view of the complete absence of any other showing of employment, this testimony can scarcely be said to constitute a sufficient basis for the commission's finding.

On the subject of the average earnings of a pin setter, the evidence showed that a pin setter who was permanently employed, working eight hours a day seven days a week, would have average daily earnings of from $1.50 to $2.50, or if it were a good day and a good pin setter, he could make $3; that the average was $2 a day. The records introduced in evidence by petitioners showed that the earnings of pin setters regularly employed by them averaged $10 per week, and often less. Thus the evidence showed that even if decedent had been a good pin setter, regularly employed, his maximum average weekly earnings would not have exceeded $14. It is obvious that he could not have supported himself from this sum and still have contributed $10 to $15 a week to his mother's support. Not only this, but the evidence also showed without contradiction that decedent was not a regular pin setter; he was at most merely an intermittent pin setter. The commission therefore erred in basing the payments herein upon the average earnings of a regular pin setter.

One witness testified that decedent had been on relief. Petitioners, in their application to the commission for a rehearing, alleged that they had investigated this statement and found it to be true, and they proffered a letter from the Director of the California State Relief Administration stating that the relief records showed that decedent had disclaimed employment during December, 1936; that he had received relief thereafter; that on January 7th he had received $8.20, and subsequently twice a month until March 31st, 1937, he had received $9.13. The commission refused this proof.

From the above résumé it will be seen that the record contains no support for the allowance of so large a sum as awarded by the commission. Additional evidence should be taken on this issue to ascertain, if possible, both the average earnings of an intermittent pin setter and whether decedent actually contributed more than a nominal sum to his mother's support, thus laying the basis for computation of a proper award, should the commission retain its view that decedent was in fact injured in the course of his employment.

The award is annulled, the cause remanded, and the commission is directed to take such further proceedings, consistent with the views above expressed, as it may deem advisable.

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11 Cal.2d 273

LOS ANGELES COUNTY v. JESSUP, Chairman of Board of Sup'rs.

S. F. 15979.

Supreme Court of California.

May 2, 1938.

As Modified May 31, 1938.

1. States 🔑119

Statute purporting to release all liens theretofore imposed for aid granted under Old Age Security Law, as applied to property which has passed subject to liens to heirs or grantees of recipients of aid, is unconstitutional, since to discharge liens in favor of such persons constitutes a gift to them of "public money or thing of value" in violation of constitutional provision. St.1935, p. 1769, § 4; St.1937, p. 1094, § 2225; Const. art. 4, § 31.

[Ed. Note.—For other definitions of "Public Money," see Words & Phrases.]

2. States 🔑119

Statute purporting to release all liens theretofore imposed for aid granted under Old Age Security Law, as applied to properties of persons who never were entitled to aid, is unconstitutional, since to release such liens constitutes a gift of "public money or thing of value" in violation of constitutional provision. St.1935, p. 1769, § 4; St.1937, p. 1094, § 2225; Const. art. 4, § 31.

3. Statutes 🔑64(2)

Statute purporting to release all liens theretofore imposed for aid granted under Old Age Security Law, including liens on properties of persons never entitled to aid and liens on property in hands of heirs or grantees who took or purchased property subject to lien, was fatally defective and invalid for all purposes, even if legislation might constitutionally be framed looking to relief of such statutory liens as applied to certain classes of property, in view of inseverability of statute. St.1935, p. 1769, § 4; St.1937, p. 1094, § 2225; Const. art. 4, § 31.

4. Statutes 🔑64(1)

A statute, which is not severable and which by its express terms permits an application effect of which is unconstitutional, is invalid notwithstanding its provisions also permit and contemplate another and different application with legal and proper effect.

5. Statutes 🔑64(2)

Statute, unequivocally providing that all liens theretofore created or imposed for aid granted under Old Age Security Law "are hereby released" and counties "are directed" to execute instruments evidencing such release, was not severable, in so far as it purported to release "all" pre-existing liens, so as to render portions thereof valid notwithstanding invalidity of remainder. St.1937, p. 1094, § 2225; Const. art. 4, § 31.

6. Constitutional law 🔑161

Statute purporting to release all liens and mortgages theretofore created for aid granted under Old Age Security Law, and directing counties to release such mortgages, was unconstitutional as impairing obligation of contract. St.1937, p. 1094, § 2225; Const. U.S. art. 1, § 10; Const.Cal. art. 1, § 16.

7. Constitutional law 🔑161

Statute purporting to release all liens and mortgages theretofore created for aid granted under Old Age Security Law could not be construed as undertaking to work a mere procedural or remedial change which could be given a retroactive operation without violating constitutional provisions prohibiting impairment of obligation of contract, since, whether regarded as remedial change or otherwise, statute purported to destroy entirely a substantive contractual right of counties to mortgages executed in their favor as security for reimbursement of aid granted in reliance thereon. St.1937, p. 1094, § 2225; Const.U.S. art. 1, § 10; Const. Cal. art. 1, § 16.

8. Constitutional law ⚿169

States may change form of remedy or may modify it otherwise as they may see fit, provided no substantial right secured by contract is thereby impaired. Const. U.S. art. 1, § 10; Const.Cal. art. 1, § 16.

9. Constitutional law ⚿169

A remedy, where it affects substantial rights, is included in term "obligation of a contract," and remedy cannot be altered so as to materially impair such obligation. Const.U.S. art. 1, § 10; Const.Cal. art. 1, § 16.

[Ed. Note.—For other definitions of "Obligation of Contract," see Words & Phrases.]

10. Statutes ⚿205

A statute must be read as a whole.

11. Constitutional law ⚿103

Under statute providing that all aid granted under Old Age Security Act shall be held subject to provisions of any law that may thereafter be enacted in amending or repealing provisions of act and "no recipient under this act shall have any claim for compensation or otherwise by reason of his aid being affected in any way by any such amending or repealing act," Legislature intended that recipient of aid under act should not under any circumstances acquire a vested right thereto but should at all times receive such aid subject to a change in or repeal of the act. St.1929, p. 916, § 12; St.1937, p. 1078, § 2002.

12. Constitutional law ⚿161

Statute purporting to release all liens and mortgages theretofore created for aid granted under Old Age Security Law was not valid on ground that statute was contemplated by old provision which was carried into Welfare and Institutions Code, which provided that all aid granted under act should be subject to provisions of any law that might thereafter be enacted, amending or repealing provisions of act, and that no recipient should have any claim by reason of his aid being affected by any such amending or repealing act. St.1929, p. 916, § 12; St.1937, pp. 1078, 1094, §§ 2002, 2225.

In Bank.

Original mandamus proceeding by the County of Los Angeles against Roger Jessup, as Chairman of the Board of Supervisors of Los Angeles County, to compel the respondent to execute certain releases of liens and mortgages acquired by petitioner upon real properties of the recipients of financial aid granted under the Old Age Security Act, wherein the respondent filed a demurrer.

Demurrer sustained, alternative writ discharged, and peremptory writ denied.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, and S. V. O. Prichard and L. K. Vobayda, Deputies Co. Counsel, all of Los Angeles, for petitioner.

Gail J. Burck, of Los Angeles, for respondent.

WASTE, Chief Justice.

The petitioner seeks by this proceeding in mandamus to compel the respondent, as chairman of its board of supervisors, to sign and execute certain releases of liens and mortgages acquired by petitioner upon the real properties of the recipients of financial aid granted under the provisions of the Old Age Security Act. Respondent has demurred.

It appears that the Old Age Security Act was originally enacted in 1929, St.1929, c. 530, p. 914. Generally speaking, the statute provided for the granting of financial assistance to the needy aged who met the requirements of the act and whose property did not exceed in value a specified amount, as originally enacted, $3000. A detailed statement of the requirements that had to be satisfied in order to make one eligible for the benefits available under the act is not indispensable to our present problem. As originally adopted, the statute declared that as a condition to the granting or continuance of aid the board of supervisors of the county "may" require the applicant to transfer his property to the board, the net income therefrom to be paid to the owner and in the event of discontinuance of aid or death of the recipient the remainder of the property over and above the amount of aid paid to be returned to him or his estate. Provision was also made, under certain circumstances, for the recovery of excess aid paid when the recipient's property or income exceeded the amount allowed under the act. Double-the amount paid was recoverable if upon the death of the recipient his property or income was found to be greater than that permitted under the act. Such, briefly, were the provisions for reimbursement that existed until 1935.

In this latter year, the provision for transfer of the recipient's property to the county was repealed and section 4 of the act was amended, St.1935, p. 1769, to provide, in substance, that aid granted to any person under the provisions of the act "shall constitute a debt of such person" to the state and county participating in the granting thereof and that upon the filing by the board of supervisors with the county recorder of a notice of the granting of aid such notice "shall have the force, effect and priority of a lien of a judgment," which lien "shall be deemed security for reimbursement to the State and county" for the amount of aid paid. The provisions for the recovery of "excess" aid when the recipient's property was found to exceed the allowed value, though amended, remained substantially the same as in the original act and as outlined above.

Therefore, in 1935, for the first time, provision was made for what may be termed a statutory lien which was to serve as security for reimbursement to the state *and county* for aid given under the act. In May, 1937, when the Old Age Security Act was incorporated in and made a part of the Welfare and Institutions Code, St. 1937, c. 375, p. 1185, which Code was adopted at the same legislative session and went into effect immediately as an urgency measure, St.1937, c. 369, pp. 1078–1095, 1183, §§ 2000–2228, 20200, sections 2224 and 2225 of said code, pp. 1093, 1094, became the successor sections to or the counterparts of the former amended section 4 of the original Old Age Security Act in that they, too, provided that aid granted to persons under the provisions of said chapter of the Welfare and Institutions Code should constitute a debt of the recipient to the state and county, section 2224, and that upon the filing with the county recorder of a notice of granting of aid, such notice should have the force, effect, and priority of a judgment lien and should be security for the reimbursement to the state and county of the amount of such aid, section 2225. Subsequently, and at the same legislative session, these sections were amended, St.1937, c. 405, p. 1343, effective September 1, 1937, so as to shift the debt or liability created for aid so granted from the recipient thereof to a spouse or adult child pecuniarily able to support said recipient, section 2224, p. 1094, and so as to omit all provisions for a statutory lien and purportedly to discharge all liens theretofore imposed for such relief, section 2225, p. 1094.

Inasmuch as our problem turns upon the construction and effect of the amended section 2225, effective, as stated, September 1, 1937, we quote it verbatim: "2225. Aid granted under the provisions of this chapter shall not constitute a lien upon any property of the recipient and all liens and mortgages heretofore created under the provisions of this chapter are hereby released and the board of supervisors of each county is hereby directed and authorized to execute and record appropriate instruments of release."

[1] The foregoing legislative history discloses that from 1935 until September 1, 1937, a *statutory lien* was accorded to the counties as security for reimbursement to them for aid granted under the act. Upon the latter date, by legislative edict all such liens *"and mortgages"* were purportedly "released" and the counties authorized and "directed" to execute and record appropriate instruments of release, and this, whether or not the property continued to be owned by the person who received the aid and whose property was made subject to the lien as security for reimbursement. In other words, section 2225 of the Welfare and Institutions Code, p. 1094, as it now reads, purports to wipe out and destroy all such liens heretofore impressed even though the properties encumbered thereby are now owned by third persons who purchased or acquired the same from the recipients of the aid *subject to* such liens. In fact, of the eight "typical" cases alleged in the petition, of which typical cases conceded several hundred or more of each type or class exist throughout the state, at least three are of a type or class wherein the property *has* passed subject to the lien to an heir or grantee of the recipient of the aid. To release and discharge the lien in favor of such persons, as section 2225, supra, purports to do, in our opinion constitutes a gift to them of "public money or thing of value" in violation of section 31 of article 4 of the Constitution. In the event of personal inability or refusal of the recipient of the aid to reimburse the participating governmental agencies for the aid so granted, such agencies must look for reimburse-

ment to the security of the lien theretofore imposed. To destroy the security by release of the lien may in many cases forever preclude such reimbursement to the financial loss of the participating governmental agencies and the aggrandisement of the heirs or grantees alone, who took subject thereto.

[2] In addition, the petition sets forth another "typical" case, of which many other similar cases allegedly exist in the state, wherein the recipient, whose property was made subject to lien for the aid granted, was not at any time entitled to such aid because of ownership by him at all times of property of a value in excess of that allowed by the act. Because the recipients in this class of cases did not acquire such excess property subsequent to their application for and receipt of aid and are not now deceased, sections 2222 and 2223 of the Welfare and Institutions Code, p. 1093, which provide for reimbursement in such instances, are not applicable to the situation. We are satisfied, therefore, that to release and wipe out the liens heretofore imposed upon the properties of persons who, it now develops, never were entitled to aid, likewise constitutes, as in the other three typical cases above mentioned, a gift of "public money or thing of value" in violation of the constitutional provision.

[3, 4] In so far as the amendment of section 2225, effective September 1, 1937, purports to release *all* liens theretofore imposed for aid granted under the old age security law, including, as stated, liens on property of persons never entitled to aid and liens on property now in the hands of heirs or grantees who took or purchased subject thereto, the section is fatally defective and invalid, and this, even if we assume, without deciding, that legislation may constitutionally be framed looking to the release of such statutory liens as may exist under other classes of "typical" cases alleged in the petition. This is so, for the reason that a statute which is not severable and which by its express terms permits an application the effect of which is unconstitutional, is invalid even though its provisions also permit and contemplate another and different application with a legal and proper effect.

This proposition found expression in the case of City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390, wherein was involved a statute authorizing a county to own, lease or operate a cement manufacturing plant and to sell its products. It was urged that this amounted to taxation for a private purpose, which made the statute unconstitutional in that it authorized the county to sell the cement to private persons. In opposition thereto it was replied that the only action contemplated under the statute was for public purposes and reference was made to the rule which favors a construction and presumption in favor of constitutionality. In disposing of the issue this court declared, 175 Cal. 777, at page 783, 167 P. 390, 393, that: "It has been said that to save even a legislative enactment nothing can be read into it nor read out of it. The supreme test of the validity of any such law is not what may have been done under it, not, as here, what the contracting parties may by convention agree to do or not to do under it, but it is what *may be* done under it. * * * No man can doubt but that under this law a county acquiring a cement plant is authorized to manufacture all of the cement which that plant can produce and sell all that it desires to private consumers. To deny this right and power under the law is to destroy the law itself and to frame a law distinctly the contrary of that which the Legislature deliberately and advisedly formulated and passed. So plain is this that respondents cannot successfully urge the severability of the statute and that a part of it can be saved by a construction limiting the cement production to the public needs of the county; for this, as we have said, would be to make a law which the Legislature has not made and which requires legislative deliberation and determination before it can be made."

To the same effect see Matter of Lambert, 134 Cal. 626, 634, 66 P. 851, 55 L.R.A. 856, 86 Am.St.Rep. 296.

[5] As stated above, section 2225 expressly and unequivocally provides that *"all"* liens theretofore created or imposed for aid granted *"are hereby released"* and the counties are *"directed"* to execute instruments evidencing such release. Paraphrasing the language of the Lewis Case, supra, no man can doubt but that under this section a county is authorized and directed to release a lien in favor of a third party ineligible for any relief or aid. To deny this right and power under the section is to destroy the section itself, and to frame a section distinctly the contrary of that which the Legislature deliberately and advisedly formulated and passed. So plain is this that petitioner cannot successfully urge

the severability of the section and that a part of it can be saved by a construction limiting the release of liens to those situations where the benefits would accrue to persons eligible for old age security. For this, as we have said, would be to make a law which the Legislature has not made and which requires legislative deliberation and determination before it can be made. The section here involved, in so far as it purports to release "all" pre-existing liens, is not susceptible of severability to allow application of the rule enunciated in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239, cited with approval in Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177, for in each of such cases a reasonable classification was present. What has been said is fatal to the issuance of the writ as to any and all of the "typical" cases alleged in the eight counts of the petition.

[6-9] In addition, as to at least seven of the eight alleged "typical" cases, the section is also constitutionally objectionable because of its impairment of the obligation of contract. In this connection it appears that all of the "typical" cases except that set forth in count one of the petition, involve rights and obligations accruing not alone under the *statutory* lien contemplated and imposed between 1935 and September 1, 1937, but rather rights and obligations flowing from a contractual relationship. That is to say, in the many hundreds of cases identical with the "typical" cases set forth in counts 2 to 8, inclusive, of the petition, the petitioner elected to avail itself in many instances not of the *statutory* lien then contemplated by and provided for in the act, but preferred to and did enter into a contractual relationship with the recipients of aid in all such cases, as a result of which it procured from them mortgages pledging their properties as security for the reimbursement of the aid so granted. For the amended section 2225, supra, to declare such mortgages theretofore executed "hereby released" and for it to "direct" execution and recordation of appropriate instruments evidencing such release as it purports to do, is to cause it to do violence to the federal and state constitutional provisions prohibiting the impairment of the obligation of contract. Const. U.S. art. 1, § 10; Const.Cal. art. 1, § 16. Nor may it successfully be contended that the section, as amended, undertakes to work a mere procedural or remedial change that may properly be given a retroactive operation. The decision in Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712, precludes any such construction of the statute. In the cited case, it was sought to give a retroactive application to a statute which provided, in substance, that a deficiency judgment should not be rendered for the balance due upon any obligation secured by deed of trust or mortgage with power of sale, following the exercise of such power of sale, unless the notice of breach and election to sell was recorded at least one year before the date of sale. As to instruments executed prior to its enactment, the effect of the statute was to cause the beneficiary or mortgagee to either waive his right to a deficiency judgment or to wait nine months longer than he was formerly required to do before a sale of the property might be held to satisfy the debt. It was there declared that the attempted retroactive application of the statute could not be justified as a mere remedial change. The decision quotes from the authorities to the effect, supra, 5 Cal.2d 226, 231, 54 P.2d 712, 714, that: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired." The opinion then states that if the statute there involved be retroactively applied "the right to a deficiency judgment has either been entirely taken away from the creditor, or he must wait an additional period of nine months before he may have judgment. *These are substantial rights which are either entirely abrogated or suspended, and the fact that this is accomplished by legislation which has to do with the remedy rather than the substance of the contract is not controlling.* * * * 'The remedy, where it affects substantial rights, is included in the term "obligation of contract," and the remedy cannot be altered so as to materially impair such obligations.' * * * Thus the contention now under consideration, if accepted, would work a change in the substantive rights of the creditor under the guise of a change in remedy. * * * 'The existing remedy cannot be so altered as to take away or impair any of the rights given by the contract.' "

The foregoing quotation is peculiarly pertinent to the present cause. Whether the amended section 2225 be regarded as a remedial change or otherwise, it purports to entirely destroy a substantive contractual right of the counties in and to the mortgages executed in their favor as security for reimbursement of the aid granted in reliance thereon. As stated above, in the event of refusal or inability of the recipients of such aid to make reimbursement, the counties may look to the mortgages to recoup the advances made. To release such security by statute, is to interfere with and destroy a valuable substantial right under the contract.

[10-12] We are not impressed with petitioner's argument that the language of section 12 of the Old Age Security Act, St.1929, p. 916, in effect with the adoption of that law in 1929 and carried into the Welfare and Institutions Code as section 2002, St.1937, p. 1078, contemplated and authorized the amendment purporting to release "all liens and mortgages" imposed or created under the act. The section as originally enacted, and as it read when the liens and mortgages here involved were imposed or created, provided that: "Any and all aid granted under the provisions of this act shall be deemed to be granted and held subject to the provisions of any law that may hereafter be enacted amending or repealing in whole or in part the provisions of this act, *and no recipient under this act shall have any claim for compensation or otherwise by reason of his aid being affected in any way by any such amending or repealing act.*" The entire section must be read as a whole. The latter and italicized portion thereof definitely indicates to us that it was the legislative intention that the recipient of "aid" under the act should not, under any circumstances, acquire a vested right thereto but should at all times receive the same subject to a change in or repeal of the act. This is the only reasonable construction of which the section is susceptible. It is interesting to note that throughout the history of this section the marginal notes thereto and the title thereof undertook to so describe its purpose. See St.1929, p. 916; Welfare and Institutions Code, § 2002. The use of the word "aid" throughout the section fortifies our construction thereof. Obviously, the section was not intended to affect the rights of the county under the act. Nor do we think this result was achieved by the placing of a period where a comma formerly existed, thereby splitting the section into two sentences when it was incorporated into the Welfare and Institutions Code. As so punctuated, it must still be interpreted as herein indicated. We are of the view, therefore, that as to liens and mortgages imposed or created prior to the 1937 amendment of section 2225, supra, the rights of participating counties had become fixed and vested.

What we have said, in our opinion, is determinative of this proceeding. Contentions of counsel not specifically mentioned herein have been considered and found to be without merit or not indispensable to our determination of the cause.

We do not feel that our conclusion herein in any way interferes with a legislative policy having for its purpose the giving of aid to indigents, as that term is commonly understood. It appears from petitioner's points and authorities that as security for some $960,000 advanced under the act it holds approximately 4,000 mortgages on real property valued at approximately $3,000,000. That such property should remain as security, as originally contracted, for the repayment of said amount does not appear unreasonable or harsh. The money recouped thereby may then be made available for other needy causes, thus tending to foster a policy of public assistance to those entitled thereto.

The demurrer is sustained, the alternative writ is discharged and the peremptory writ is denied.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

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11 Cal.2d 271

PEOPLE v. TUCKER.

Cr. 4143.

Supreme Court of California.

April 29, 1938.

1. Homicide 🔑253(1)

Evidence *held* to sustain defendant's conviction for first degree murder of deceased who had been assaulted by defendant.

2. Homicide 🔑237

Where defendant had been found sane on his plea of not guilty of murder by reason of insanity, evidence that defendant was an epileptic could not affect judgment of conviction.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Frank Tucker was convicted of first degree murder, and he appeals.

Judgment affirmed.

Richard Seely, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Albert F. Zangerle, Deputy Atty. Gen., for the People.

LANGDON, Justice.

This is an appeal from a judgment of conviction of murder in the first degree and from the order denying a motion for new trial. Defendant was sentenced to death.

The record shows that at about 2:30 a. m. on July 11, 1937, the decedent, Antonio Martinez, apparently in an intoxicated condition, left a Sacramento saloon and proceeded along the street where he crossed the path of defendant, a stranger to him. At this time the decedent addressed a foul epithet to him. Thereupon the defendant followed the decedent across the street and after some time caught up with him and struck him in the face with his fists. The decedent fell to the ground and defendant kicked him as he lay there. Then he kneeled over the decedent and struck him three times in the chest with a stabbing motion. The defendant threw decedent's hat at him and left quickly towards his home. The decedent arose and staggered to the middle of the street, where he fell. Shortly thereafter police officers found decedent and were directed to the defendant, whom they apprehended. They found a pocketknife in defendant's clothes, the larger blade of which was capable of inflicting a wound found on decedent's chest. Decedent died a few hours after the encounter and the cause of death was found to be hemorrhage from a wound in the heart. His body showed three wounds on the chest.

All the facts concerning the assault were observed by an eyewitness for the prosecution. This witness did not observe any knife in the defendant's hand nor did he see any act of opening the pocket knife later found in defendant's possession, but he did observe the stabbing motion. The assault is admitted by the defendant, his only contention being that he struck the decedent with his fists and feet but not with a knife, and that he was not responsible for the death of decedent. Considerable stress is placed by defendant on the fact that no blood stains were discovered on the knife blade upon subsequent examination. However, an expert medical witness for the prosecution testified that, if a knife passed through the muscle in the region of the heart, where the fatal wound was inflicted, and was quickly withdrawn, it could be wiped clean of blood both by reason of the contraction of the muscle and the lack of time in which the blood might coagulate.

[1, 2] It thus appears that the evidence, both direct and circumstantial, was ample to justify the verdict of murder in the first degree, and defendant has failed to show any grounds for reversal or for modification of the judgment. It is true that the record does contain some evidence that defendant was an epileptic but, since the jury found him sane on his plea of not guilty by reason of insanity, this evidence cannot affect the judgment rendered.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.; HOUSER, J.

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11 Cal.2d 188

CALIFORNIA CANNING PEACH GROWERS v. HARKEY et al.

Sac. 5102.

Supreme Court of California.

April 22, 1938.

Rehearing Denied May 19, 1938.

1. Agriculture 🔑6

Evidence relating to marketing contract entered into by peach grower and co-operative association established that written contract, which did not refer to 55 acres owned by peach grower's father other than by means of memorandum of acreage on cover, did not include 55-acre tract, and that agreement concerning 55-acre tract was oral, notwithstanding that a contrary inference might be implied from association's method of bookkeeping.

2. Evidence ⇐450(1)

Where wording of letter written to co-operative association concerning interpretation of marketing contract was ambiguous, parol evidence to explain ambiguity was admissible in association's action to have its rights under contract declared.

3. Agriculture ⇐6

Where letter to co-operative association written by peach grower's father referred to land rented by grower, which was also mentioned in memorandum on cover of marketing contract, by stating that land belonging to father had apparently been included in contract, that statement did not constitute admission that contract actually covered that land.

4. Agriculture ⇐6

Where by-laws of co-operative association prohibited association from classifying its membership or dealing in products of nonmembers and provided for amendment of by-laws by majority vote of members, a resolution passed by board of directors authorizing management to deal with renters on different basis from that applicable to regular members was in excess of powers of board.

5. Agriculture ⇐6

A member of co-operative association in entering into marketing agreement was not chargeable with greater knowledge of provisions of by-laws of association than that possessed by directors and managing agents who believed that they had power to enter into such an oral agreement in violation of by-laws, where agreement was authorized by resolution of directors of association and did not violate statutory provisions. Civ. Code, § 653ff, as amended by St.1927, p. 567, and § 653vv, as amended by St.1931, p. 1846; St.1933, p. 255, § 1194(i).

6. Agriculture ⇐6

A co-operative association, in entering into oral contract with peach grower ultra vires its by-laws, could claim no greater rights thereunder than a corporation under similar circumstances, as against contention that law applicable to ultra vires contracts of corporations did not apply to co-operatives. St.1933, p. 264, § 1219.

7. Corporations ⇐487(1)

The doctrine of ultra vires does not apply to fully executed contracts, where they do not violate statutory law or public policy.

8. Corporations ⇐387(2), 487(1)

Where ultra vires contract is not malum in se or malum prohibitum, the party who has fully performed may recover thereon provided other party has received benefits of transaction and doctrine of ultra vires can be raised only by state.

9. Agriculture ⇐6

Where oral contract entered into by co-operative association and peach grower giving peach grower preference over regular members as to his rented land was ultra vires the by-laws of association, although it had been authorized by resolution of directors and was in accord with statutes, association, after contract had been performed by both parties, could not compel grower to return money paid in accordance therewith and could not enforce regular member contract against grower. Civ.Code, § 653ff, as amended by St.1927, p. 567, and § 653vv, as amended by St.1931, p. 1846; St.1933, p. 255, § 1194(i).

10. Agriculture ⇐6

A co-operative association which had received peaches from rented land under oral contract granting grower a preference as to that land, and which had made no tender of benefits received, was estopped from compelling grower to perform obligations of a regular member or to return money paid in accordance with oral agreement, on ground that oral contract was ultra vires the by-laws of association. Code Civ.Proc. § 1962 (3).

11. Agriculture ⇐6

Under statute limiting right to assert, as between a corporation and any third person, a limitation upon powers of corporation, co-operative association could not avoid its obligations under oral marketing agreement giving peach grower preference as to rented land on ground that agreement was ultra vires. Civ.Code, § 345.

12. Agriculture ⇐6

A co-operative association could not avoid its obligations under oral contract giving peach grower preference as to rented land, on ground that upholding contract would have disastrous effect on affairs of co-operatives and that only basis upon which they could survive was that of equality of treatment of all members, where Legislature had determined that it was in the public in-

terest to permit co-operatives to enter into preferential contracts. Civ.Code, § 653ff, as amended by St.1927, p. 567, and § 653vv, as amended by St.1931, p. 1846; St.1933, p. 255, § 1194(i).

In Bank.

Appeal from Superior Court, Butte County; R. N. Rankin, Judge.

Action by the California Canning Peach Growers, a nonprofit co-operative association, against W. P. Harkey and another for the purpose of having its rights under a marketing agreement entered into with defendants declared, wherein the defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

For prior opinions, see 69 P.2d 915, 70 P.2d 651.

Agnew & Boekel and Carroll Single, all of San Francisco, and J. Francis Good, of Oroville, for appellant.

Seth Millington, of Gridley, and Jerome D. Peters, of Chico, for respondents.

Richard W. Young, of Oakland, amicus curiæ for Berkeley Bank for Cooperatives, Production Credit Corporation of Berkeley, Federal Intermediate Credit Bank of Berkeley, and Federal Land Bank of Berkeley.

Floyd B. Cerini and F. X. Kerner, both of Oakland, amici curiæ for Berkeley Bank for Cooperatives.

PER CURIAM.

This action was commenced by plaintiff, California Canning Peach Growers, a nonprofit cooperative association, against defendants for the purpose of having its rights declared under a written agreement alleged to have been entered into between the association and defendants. Defendants Harkey answered setting up their interpretation of the transaction, and cross-complained for certain sums alleged to be due from the association to them. The Harter Packing Company was originally made a defendant, but upon paying certain sums into court, by consent of all concerned, was dismissed from the action. During the course of the trial the parties stipulated as to the exact sums that would be due one to the other depending upon which interpretation of the contract was accepted by the trial court. The trial court decided in favor of the Harkeys, and judgment was entered in their favor in the amount stipulated to by the parties. From that judgment plaintiff appeals.

This appeal is but one of four appeals now under submission in this court dealing with the rights of the association against various peach growers with whom it contracted. The other three causes are Stafford v. California Canning Peach Growers, Cal.Sup., 78 P.2d 1150; California Canning Peach Growers v. E. R. and F. O. Williams, Cal.Sup., 78 P.2d 1154, and California Canning Peach Growers v. Williams, Poggetto and Williams, Cal.Sup., 78 P.2d 1161, S.F. 15906. The general facts out of which these four controversies have arisen are the same for all of the cases. These general facts will be set forth in full in this opinion and will not be repeated, except where necessary, in the other three opinions, but should be considered as applicable to those appeals. The facts peculiar to each case and the law applicable to those facts will be set forth separately in each opinion.

It should be mentioned that in all four cases, the trial courts (all four cases were tried before different trial judges) rendered judgment against the association. The evidence on some of the points was conflicting. In accordance with the usual rule on appeal the evidence hereafter stated is that most favorable to the respondents.

General Facts.

The association was organized as a nonprofit cooperative marketing association in the year 1921 under the then existing provisions of title 21 of the Civil Code. At that time articles of incorporation and bylaws were adopted providing for the manner of conducting the business of the association. In the by-laws there was set forth in hæc verba a form of marketing agreement which each member was to sign. The general legal effect of the by-laws and the marketing agreement has been considered by the appellate courts in California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679; California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572; and California Canning Peach Growers v. Bardell & Oregoni, 132 Cal.App. 153, 22 P.2d 764.

The articles of incorporation are quite general in their provisions. Among other things it is therein provided that the purposes of the association are to promote, foster, and encourage the producing, preparing for market, and marketing of canning peaches; to engage in the production, preparing for market, and marketing of such peaches; to furnish facilities through which canning peaches shall be prepared for market and marketed upon a uniform plan; to encourage its members in the production of better qualities of canning peaches; to find the readiest and most available markets for its members, and to purchase and sell the canning peaches produced by its members; to enter into contracts with its members for the purchase by it of the canning peaches produced or to be produced by its members; to enter into contracts with the members for the handling and marketing of peaches by the association as their agent; "to do each and everything necessary, suitable or proper for the accomplishment of any of the purposes herein enumerated or which shall at any time appear conducive to or expedient for the benefit of this association or its members." It is obvious from these provisions, and from a fair reading of the articles as a whole, that the main purpose of the association was to handle the peaches of its members on a cooperative basis, but it is to be noted that there is nothing contained in the articles that would prohibit the association from classifying its membership, or in fact from dealing with nonmembers, if so to do were in the best interests of its members.

The by-laws were more explicit. They prohibited any dealings with nonmembers and likewise prohibited any classification of the membership. Among other things, they provided that the association was organized for the purpose of mutual help, for the purpose of serving its members only; that any person, firm, or corporation engaged in the production of canning peaches or owning or leasing lands on which canning peaches are grown, may be admitted to the association and shall have voting power and property rights therein on the same basis as all other members; that all of the members agree to abide by all of the rules of the association with reference to the production, handling, and marketing of their product as provided in the by-laws or as may hereafter be determined either by amendment of the by-laws or by resolution of the board of directors; that all members will sign standard marketing agreements from time to time; the present standard marketing agreement is attached thereto and made a part thereof, and all other standard marketing agreements will be similar thereto in all substantial points; that all members shall be bound by all of the terms of any such agreements; that the voting power of the members of the association shall be equal; that the property rights and interests of the members in the property of the association shall be equal; that all new members shall be admitted on the same basis as all other members; that each member must agree to market the canning peaches grown or owned by him in accordance with the provisions of the standard marketing agreement.

The standard marketing agreement incorporated in the by-laws requires the owner or grower of peaches from the date of execution to 1936 to sell to the association all the canning peaches grown on the lands described in the agreement. It is conceded by all concerned that a grower owning more than one orchard could sign up with the association as to any or all of his orchards, but that the mere fact that he had signed up as to one orchard did not require him to market the peaches from his other orchards through the association. The marketing agreement provides for the pooling of all peaches of like grade and kind, the price to be paid to the grower to be the average or pooled price; that after deducting the expenses, the association will pay the growers the proceeds of all of the sales made by it less an "Association charge not to exceed 5% of the gross sales. From this 5%, organization and other general Association expenses, shall be deducted, and with the balance a commercial reserve shall be created." This 5 per cent. withholding fund was not intended to be used to defray the ordinary expenses of the association. The ordinary expenses were paid from a handling charge of $1.50 per ton allowed to the association by the commercial canners to whom the association sold its fruit. In other words, after the market price to be paid by the canners to the association had been fixed, the association would receive from the canners an additional $1.50 per ton as a handling charge. The 5 per cent. fund was intended as a reserve, and to take care of any losses of the association. This reserve in the last few years was entirely used to defray losses incurred in the canning activities of the association. It was intended that this 5 per cent. should be withheld from the growers for three years (later extended to five) and then paid to the growers if any portion remained after deducting losses. To illustrate: If the market price for peaches was fixed at $30 per ton, the association would actually receive $31.50 per ton from the canners. The $1.50 per ton carrying charge was applied to the operating costs of the association. The grower, in such a year, would receive but $28.50 per ton—$30 less 5 per cent. This 5 per cent., it was intended, should be kept as a reserve, and paid to the grower at the end of a definite period if any portion remained after deducting losses.

The marketing agreement expressly provides that the association "will not buy or deal in any peaches except under contracts similar to this contract." It also provides, as does the by-laws, for liquidated damages of 50 per cent. of the market price of the grower's crop in the event of breach by the grower. The agreement purports to cover the period from the date of execution to 1936, but provides that the grower and his lands shall be released from the contract in the event of a bona fide sale of the lands subject to the contract, and likewise permits the grower to withdraw from the association in any even numbered year by serving upon the association a written notice of withdrawal as provided in the contract.

The above summary of the by-laws clearly indicates that they prohibited the association from classifying its membership, or from dealing in the peaches of nonmembers.

Some reference should also be made to the statutory law governing such associations. By the provisions of section 653sb of the Civil Code as added in 1921, St.1921, p. 464, and as in effect when the appellant was incorporated, the association was expressly prohibited from dealing with nonmembers in products similar to products handled for its members. In 1923, St.1923, p. 235, this section was amended to provide that any cooperative association formed under title 21 may "use or employ any of its facilities for any purpose, provided the proceeds arising from such use and employment shall go to reduce the cost of operation for its members; and provided, further, that products of non-members, similar to the products handled for its members, shall not be dealt in to an amount greater in value than such as are handled by it for members." In 1931 title 21 was repealed and all such cooperatives by the provisions of section 653vv of the Civil Code were placed under title 23, St.1931, p. 1846, that section providing that all previously incorporated cooperatives "shall be deemed organized and existing under and by virtue of the terms of this act and all of the provisions of the terms of this act, and any of the restrictions and benefits thereof shall apply in all of their terms to such corporation." One of the sections in title 23 of the Civil Code thus made applicable to this appellant was section 653ff which, as amended in 1927, St.1927, p. 567, in enumerating the powers of such associations, in subsection (i) conferred upon the association exactly the same powers that had been conferred upon it in 1923 by the amendment to section 653sb supra. In 1933 the Legislature adopted the Agricultural Code, St.1933, p. 60, and in section 1194 re-enacted the exact provisions of section 653ff subsection (i) of the Civil Code above referred to.

This statutory history reflects a change in legislative policy towards the powers of such cooperatives of considerable importance on these appeals. Until 1923 it was believed that such associations should deal only with the products of its members, and that all members should be treated equally. In 1923 and thereafter this policy was changed to authorize unequal treatment and to permit dealings with nonmembers. This change in legislative policy towards the powers of such cooperatives was based on the fact that experience had demonstrated that the two main classes of growers—owners and renters—had fundamentally different problems to face, and that a policy favorable to owner growers would not interest renter growers. The evidence in the present cases demonstrates that many tenants growing peaches on lands rented from others refused to join the association. Most of these tenants rented only from year to year, were always in need of cash, and most of them were required to pay their rentals at the close of the peach season. They had no interest in a long time policy beneficial to the peach industry as a whole. They were unwilling to enter the association under a contract whereby 5 per cent. of the gross purchase price was to be withheld from them for a period of from three to five years, particularly when they could sell directly to commercial canners for cash at the same or better price. The fact that a large number of renters of peach orchards refused to enter the association had several bad effects on the association's affairs. Obviously, the efficacy of the cooperative plan partially depends on the quantity of the crop the cooperative controls. With a large independent block of peaches owned by renters hanging over the market the bargaining power of the association with the commercial canners was materially reduced. If this independent block could be reduced and added to the association's peaches, the association would be in a better bargaining position and would secure a better price for all of its fruit, including the fruit of its regular members. The evidence shows that the canners were well aware of the advantages to them of the existence of this independent block of fruit. They used this block of renters' fruit as a club over the head of the association to drive the market price down. They frequently offered various valuable inducements to renters, such as free box rent and roadside delivery to keep this fruit out of the association. Many owners of peach orchards refused to become members, fearing their inability to rent their orchards if the orchard was signed up with the association. The association, particularly in 1923, was seriously handicapped because of its inability to control the renters' peaches. Under such circumstances the board of directors of the association met in regular session on January 15, 1924, to discuss the problem. After full discussion the board, all members being present, unanimously passed a resolution "that the management be authorized to accept marketing agreements from any and all renter members on the basis that any such renter members will be paid in full for the peaches delivered as soon as the harvesting season is over, and that the only charge to be made to such renter members for the handling of their crop would be the annual dues of 25c per ton." The authenticity of this resolution is challenged in several of the cases, the association claiming the minutes for the date in question were forged. The overwhelming weight of the evidence supports the findings that such resolution was in fact passed.

By this resolution the board of directors authorized the management to deal with renters on a basis materially different from that provided for in the marketing agreement applicable to regular members. Under this resolution the management was authorized to buy renters' fruit at market price less 25 cents per ton, and to pay for the same at the close of the harvesting season. Under the by-laws and the marketing agreement regular members received payment later, and received market price less expenses and less 5 per cent. of the market price withheld as above set forth. Moreover, renters were not to share in any losses or profits of the association as were regular members.

Although, in one sense, this resolution authorized the management to confer a benefit on renters not accorded regular members, there were various material benefits that accrued to the association and its regular members from such an arrangement. In the first place, to the extent that renters signed up, it cut down the independent block of fruit and increased the association's bargaining position. The evidence shows that this enabled the association to secure a better price for all of its fruit. This, of course, benefited all regular members. In the second place, the association made a profit of $1.75 on every ton of renters' fruit sold to the canners—the 25 cents per ton carrying charge, and the $1.50 per ton handling charge allowed by the canners to the association for all fruit bought from the association. This income was used to partially defray the association's general expenses, thus benefiting all regular members. In the third place, the evidence shows that the association, in addition to selling peaches to the commercial canners, canned a proportion of its fruit. The renters' fruit permitted the association to enlarge its canning operations, to reduce its per case overhead and canning cost. This benefited all regular members.

Another fact should be here mentioned. The evidence introduced in these cases demonstrates that the fruit the association purchased under contracts entered into pursuant to the renter resolution was fruit that the association could not and would not have received under a regular member's contract. None of the respondents would have sold the fruit involved in these cases to the association under a regular member's contract.

There can be no doubt that the resolution of January 15, 1924, violated the by-laws of the association, but we are of the opinion that such resolution did not violate the general provisions of the articles of incorporation above referred to. Although there is no direct evidence on the point, it is a reasonable inference that the board in passing the resolution believed that the statutory changes occurring in 1923 authorized the board, without amendment of the by-laws, to enter into the type of contracts authorized by the resolution.

It was the passage of this resolution, and the actions of the association under it, that furnishes the background for these four actions. The evidence discloses that from 1924 to 1935 A. D. Poggetto was general manager, and Frank B. Schmitt was assistant secretary, in fact executive secretary, of the association, and that these two officers were the authorized managing agents of the association. It appears without conflict that, after the resolution was passed, these two managing officers authorized and instructed the field agents of the association to solicit renters of peach orchards, and to sign them up if possible in accordance with the terms of that resolution; that from 1924 to June of 1935 many such renters were signed up; that during those years (with the exception of 1935) the association, for the most part, lived up to its side of the bargain and paid the renter members thus contracted with on the basis set forth in the 1924 resolution. The evidence also discloses that early in 1935 some of the regular members became dissatisfied with the activities of the then existing board of directors. Whether this dissatisfaction was based on the activities of the management in authorizing renter member contracts, or was largely based on the fact that large losses had been incurred in the canning activities of the association, does not clearly appear. An investigation was made and litigation started. This resulted, in June of 1935, in the calling of a special election to elect a new board of directors. As a result of that election a majority of the old board was displaced, and a new board elected. This resulted in the resignation or release of some of the former employees and agents of the association, including Poggetto and Schmitt, both of whom resigned. The new board determined to repudiate the actions of its managing agents under the 1924 resolution, although the record does not disclose that the new board ever formally repudiated or rescinded the resolution. In fact, in California Canning Peach Growers v. Williams, Poggetto and Williams, Cal.Sup., 78 P.2d 1161; S. F. 15906, the record discloses that the new board by resolution expressly authorized payment to many renters for their 1934 crop on a renter member basis thus ratifying renter member deals with these members. At any rate, after the new board was elected, the association demanded from some of its renter members that they refund the alleged overpayments paid to them under the 1924 resolution, and demanded that thereafter the so-called renter members deliver their peaches to the association under regular member contracts. The refusal of the renter members to comply with these demands has resulted in the four actions here involved, and in others pending in other courts.

The association takes the position that even if the association did enter into renter member contracts with respondents under the resolution of January 15, 1924, that resolution was ultra vires and illegal, and all renter members, and particularly respondents, were fully aware of this fact at the time they contracted with the association. In the second place, the association contends that the actual contracts signed by respondents were regular member contracts, that the renter member "preference" was based solely on oral contracts entered into between the association and respondents, and that the parol evidence rule prohibits the introduction of any evidence of this oral contract. This last contention is made possible because of the procedure followed by the management in signing up so-called renter members. As already pointed out, the bylaws contain a form of marketing agreement —a form adopted in 1921 and obviously applicable only to regular members. That form expressly provides for the withholding of 5 per cent. of the market price, and contains various provisions that could not reasonably apply to renter members. After a prospective renter member had been solicited by the field agents of the association, and after such agent had fully disclosed to such prospect the terms of the 1924 resolution, and the terms under which the association proposed to buy the renter's fruit, most of such prospects, and all of the respondents here involved, then took the matter up directly with Poggetto or Schmitt, or both. These managing agents would then again explain to the prospect the terms of the 1924 resolution and the terms under which the association proposed to purchase the renter's fruit. It is admitted by the association, there being no evidence to the contrary, that Poggetto or Schmitt, and the field agents, unequivocally and positively offered to buy the respondents' fruit for market price less 25 cents per ton payable at the close of the season. It also appears without conflict that each of the respondents refused to deal with the association on the regular member basis. After the two contracting parties had arrived at an oral agreement in accordance with the terms of the 1924 resolution, Poggetto or Schmitt or both would present to the renter member a regular member contract for signature. (This procedure was not followed in the Harkey case as will hereafter appear in the discussion of the facts of that case.) The managing agents then represented to the renter that the regular member contract was the only form of contract available; that it should be executed; that at the time of execution or thereafter the association would place the words "renter member" or some equivalent on the cover of the contract; that the renter member would be entered in the books of the association as a renter member; that by placing these words on the cover of the contract and by the entry in the books, that contract would then come under the terms of the 1924 resolution; that thereafter the association would pay the renter member in accordance with the 1924 resolution and in accordance with the agreement of the parties. Upon these representations the renter would execute the contract. The association contends that contracts so entered into were regular member contracts; that the agreement as to payment of market price less 25 cents per ton was purely oral and was contrary to the written contract; that to show the existence of such oral contract violates the parol evidence rule.

It should be mentioned that there is no dispute but that at the time of contracting both parties intended, in good faith, to enter into a contract in accordance with the 1924 resolution, and both parties intended, in good faith, that the contract that was executed should have that legal effect. There is also no dispute but that each of the respondents knew that the contract they executed contained a clause providing for the withholding of 5 per cent. of the purchase price of the peaches, and contained other provisions inconsistent with the 1924 resolution. We are thus presented with the unusual situation where the two contracting parties to each of the contracts here involved both agree as to their intent, both admit all of the negotiations without conflict, both knew what they intended, and both lived up their mutual understanding for many years. Now one of the contracting parties seeks to repudiate that agreement, not as to the future alone but as to past transactions most of which have been fully executed, on the grounds heretofore stated.

Another general contention of appellant association should be here referred to. Throughout its briefs appellant contends that the existence of such renter member contracts was kept secret from the general membership, and seeks by inference to imply that there was some sort of a conspiracy on the part of its officers to grant preferences to a favored few. The trial courts found on ample and sufficient evidence, and on what we consider the weight of the evidence, that no such secrecy was maintained. The evidence shows that the renter member situation was frequently the subject of discussion by the members of the board of directors and that the fact that the association was willing to enter into such contracts was widely known among renters of peach orchards throughout the state.

Facts and Law Applicable to Harkey Case, Sac. 5102.

Defendant W. S. Harkey is the father of defendant W. P. Harkey. The son owned a 35-acre ranch of which but 5 acres were planted to canning peaches. The father owned a ranch of which 55 acres were planted to canning peaches. Both of the Harkeys were influential members of the community in which they lived, and the association was particularly anxious to sign them up as members because of the influence it would have on other growers in the community. Until 1933 both had refused to join the association as regular members. The elder Harkey at that time was quite an old man and no longer directly operated his orchard. The evidence shows that in 1933 and 1934, and for some time prior thereto, the son was a tenant of the father, operating the father's peach orchard under an oral lease calling for a percentage of the proceeds as rental. The son had no authority to dispose of the peaches of this ranch without his father's consent. In February, 1933, one of the field agents of the association again approached the younger Harkey, to solicit his membership in the association. Harkey evidenced a willingness to become a regular member as to the 5 acres owned by him, and explained his relationship to his father as to the 55 acres owned by the father. The possibility of the father's 55 acres coming in to the association under the renter member resolution, inasmuch as those acres were rented by the younger Harkey, was discussed between the field representative and Harkey. Thereafter young Harkey discussed the matter with assistant secretary Schmitt. Schmitt explained the terms of the 1924 resolution. After some discussion he suggested that the son should come into the association as a regular member as to his 35 acres only five acres of which were devoted to the growing of peaches, and that as to the 55 acres owned by the father and rented by the son, the association would buy that fruit on a year to year oral contract on the basis set forth in the 1924 resolution. The son agreed to both propositions. The father later ratified his son's acts. Thereafter the son signed a regular contract, which, in the body of the contract, described the 35 acres owned by the son, and which in no way referred to the 55 acres owned by the father. Thereafter Schmitt, or some other association agent, or the field agent, caused to be placed on the cover of the contract under the printed heading contained thereon, "Memo. of Acreage," a description not only of the 5 acres owned by the son but also of the 55 acres owned by the father. The son testified that this was not in the contract when he signed it. The testimony of the agents of the appellant is that this was done for reference purposes only so as to disclose to the office staff that the association was to receive peaches from the son from 60 acres —5 acres under the written contract, and 55 acres under the oral contract.

In the year 1933 the Harkeys delivered all of their peaches to the association, and they were paid in exact accordance with their agreements—that is, the son receiving market price less 5 per cent. as called for in the written agreement pertaining to his 5 acres, and the father and son receiving market price less 25 cents per ton as called for in the oral agreement pertaining to the 55 acres. There is some dispute concerning this in the record, because of the confusing method of bookkeeping employed by the association, but the trial court so found and the weight of the evidence supports this finding.

In 1934 the arrangement for 1933 having been carried out by all the parties to the satisfaction of all, the Harkeys again delivered all of their fruit to the association under their agreements. The association, however, was unable to pay for such peaches at the close of the season, for the reason that it had canned a substantial portion of its fruit and could not pay its creditors until this canned fruit was sold. Ultimately the full amount for the son's 5 acres on a regular member basis was paid, but the full amount of the money due for the 55 acres of fruit under the oral contract was never paid. The balance due, computed on the renter member basis in accordance with the oral contract, is the basis of part of the cross-complaint of the Harkeys, and is likewise the basis for part of the judgment rendered in their favor.

Early in 1935, as already pointed out, litigation was commenced by some dissatisfied members of the association which was ultimately settled in June of 1935 by the election of a new board of directors. While this litigation was pending and before the election had been held, on June 5, 1935, W. S. Harkey wrote a letter to the association, which letter reads in part as follows:

"My son, W. P. Harkey signed an application for membership in the California Canning Peach Growers and apparently there has been included in it approximately sixty (60) acres that belong to me and in which he has no interest, he being only the owner of approximately five (5) acres of peaches * * *.

"The peaches belonging to me do not belong in the association and I am writing this letter that I am not a member, did not authorize any peaches being included and if you anticipate handling my peaches this year, to correct you."

Under date of June 14, 1935, Manager Poggetto replied to this letter in part as follows:

"We have been aware of the facts as explained in your letter concerning your peach acreage. The association has no claim on any peaches produced on acreage belonging to you and so far as the association is concerned you are free to dispose of the peaches in any manner you see fit.

"We have a contract covering the acreage of your son, Mr. W. P. Harkey, and, of course, deliveries from that acreage must be made to the association in accordance with the terms and conditions of our Marketing Agreement."

After receiving confirmation from Poggetto concerning the cancellation of the oral contract, W. P. Harkey, in company with his attorney who was also a renter member, visited the association's offices in San Francisco. They conferred with the general manager and assistant secretary. During the discussion the Harkey contract was secured from the association's files, and it was then discovered that although the body of the contract properly described the 35 acres owned by W. P. Harkey (only 5 of which were devoted to the growing of canning peaches) the memorandum of acreage on the cover of the contract contained a reference to the 55 acres owned by W. S. Harkey. Millington, the Harkeys' attorney, expressed the fear that, if a receiver were appointed for the association in the litigation then pending, some confusion might be created by that memorandum. Poggetto explained the circumstances under which that memorandum had been made, and the reasons for making it, but Millington and W. P. Harkey insisted that the cover of the contract be changed to accord with the body of the contract and with the true facts. After some discussion the officers of the association acceded to this request. They caused the original written contract to be cancelled and destroyed, and a new written contract to be executed, which was dated the same date as the original contract. This new contract was an exact copy of the original, except that the memorandum on the cover was made to agree with the description of acreage contained in the body of the contract.

Appellant challenges the above statement of facts in reference to the execution of the second contract and the writing of the letter of June 14, as being inconsistent with certain other evidence introduced by it. An examination of the record discloses that the facts as above stated are in accord with the weight of the evidence. Appellant also seeks to imply an evil motive on the part of Poggetto and Schmitt, its managing agents, in writing the letter of June 14 and in causing the written agreement to be re-executed and dated back. It is a sufficient answer to this contention to point out that this is not an action against former officials of the company for malfeasance in office, but an action against third parties for breach of contract, and to recover alleged overpayments. A reading of the transcript discloses that contained therein is no semblance of a showing of any conspiracy between Poggetto and Schmitt and the Harkeys to defraud the association. The evidence overwhelmingly demonstrates that these two officials in this transaction at all times acted in good faith. They were attempting to live up to the contracts entered into with the Harkeys by them as the managing agents of the association. Their entire course of action was directed towards this end.

After notifying the association of the cancellation of the oral contract dealing with the 55 acres, the Harkeys sold the peaches grown on this acreage in 1935 to the Harter Packing Company. The son delivered the peaches grown on his 5 acres to the association under his written contract. It should be here mentioned that the son, as to his 5 acres, has at all times admitted that this acreage was covered by the written agreement, and that as to that acreage he is a regular member of the association. He has at all times performed all obligations imposed upon him by that agreement.

As already indicated, this action was instituted by the association to secure a declaration of the rights of the association under the Harkey contract, it being its contention that the written contract covered the entire 60 acres under a regular member contract. The association seeks to recover back overpayments for the year 1933 as to the 55 acres, made on a renter member basis, a declaration that the Harkeys be paid as to this acreage for 1934 on a regular member basis, and damages of 50 per cent. of the market price for failure to deliver in 1935. The Harkeys cross-complained for the balance due them for 1934 under the oral agreement on a renter member basis, and the son demanded the balance due him on his 1935 deliveries on a regular member basis. After a protracted trial the lower court entered judgment in accordance with the contentions of the Harkeys in the amount stipulated to by the parties. From this judgment the association has appealed.

The briefs of the parties cover a wide field and discuss many questions not properly here involved. Appellant challenges many of the findings as being unsupported. No useful purpose would be served in further discussion of these factual contentions. The facts heretofore recited in this opinion are in accordance with the findings, and all such facts are amply supported by the record.

[1] One of appellant's main points on this appeal is that the original written contract as executed in 1933 covered the entire 60 acres of peach land owned by the Harkeys; that this written agreement was an ordinary marketing agreement making W. P. Harkey a regular member of the association; that the agreement to treat the 55 acres on a renter member basis was entirely oral, that to permit evidence of the alleged oral agreement violates the parol evidence rule. The point is without merit. The trial court, on sufficient evidence, found the existence of two separate and distinct contracts—a written contract as to the five acres, and an oral contract as to the 55 acres. This finding is supported not only by the testimony of respondents, but also by the

testimony of the agents of appellant who negotiated the contracts. The method of bookkeeping employed by the association, from which appellant seeks to imply a contrary inference, cannot affect the rights of the Harkeys who had no knowledge thereof nor control of the books.

[2, 3] The contention that the letter of June 5, 1935, signed by W. S. Harkey, and above quoted, conceded that the original contract included his acreage, and that the only ground assigned therein for seeking cancellation was that W. P. Harkey had no authority to deal with this acreage, is incorrect. There is no room for the principle enunciated in Ohio & M. Railroad Company v. McCarthy, 96 U.S. 258, 267, 24 L.Ed. 693, and similar cases that "where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration." The letter of June 5 did not concede that the 55 acres were covered by the written agreement. On this point the letter stated that "apparently there has been included in it (the son's written contract) approximately sixty (60) acres that belong to me," etc. The wording is ambiguous, and the parol evidence properly admissible to explain the ambiguity, demonstrates clearly the meaning of the phrase—he was referring to the memorandum on the cover of his son's contract which erroneously referred to W. S. Harkey's 55 acres. In stating that his son had no authority to sign up his 55 acres under a regular member's contract, he was simply stating the fact. Under such circumstances, as far as the present point is concerned, we are presented with a simple proposition—a written regular member contract to buy and sell 5 acres of peaches, and a second separate and distinct oral contract to buy and sell 55 acres of peaches on a year to year basis. There is, of course, no violation of the parol evidence rule in showing the existence and terms of an oral contract by parol.

[4, 5] We are next presented with the legal question as to the legal effect of the oral contract in view of the fact that the by-laws of the corporation prohibited classification of the membership or dealings with nonmembers. As already pointed out, the articles of incorporation are general and broad enough in their language to authorize the directors in passing the resolution of January, 1924. On the other hand, as already pointed out, the by-laws as drafted in 1921 and the provisions of the marketing agreement incorporated therein, were based on the theory of equality of burdens and equality of profits. Taresh v. California Canning Peach Growers, 3 Cal.2d 686, 45 P.2d 964; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679. It is also true that the by-laws expressly provided for their amendment by majority vote of the members, and that such by-laws could not be properly amended by resolution of the board of directors. Noble v. California P. & A. Growers Ass'n, 98 Cal.App. 230, 276 P. 636. The resolution of January 15, 1924, therefore, when passed, was in excess of the powers of the board of directors. However, the policy embodied in that resolution did not violate the provisions of any statute nor were its provisions illegal as violative of public policy. It was simply ultra vires the by-laws. In fact, not only was the policy of the resolution not illegal or violative of any public policy, but its general policy was in accord with the legislative policy as indicated by the amendment to section 653sb of the Civil Code in 1923, St.1923, p. 235. That this continued to be the legislative policy is indicated by the amendment to section 653ff of the Civil Code in 1927, St.1927, p. 567, and section 1194 of the Agricultural Code adopted in 1933, St.1933, p. 255. These facts serve to distinguish this case from Kansas Wheat Growers' Ass'n v. Rowan, 125 Kan. 710, 266 P. 101 so strongly relied on by appellant. In that case a farmer signed a regular member contract and then refused to deliver his wheat in accordance with the terms of that contract. When sued for breach of contract he defended on the ground that the contract had been secured through the fraudulent representations of the association's agent. The fraudulent representation relied upon was made orally by a field agent of the association and was to the effect that if Rowan would sign a membership contract the association was empowered to and would lend him money to pay his debts at 6 per cent. interest. In holding that Rowan was not legally justified in relying on this representation, the court pointed out that the lending of money would violate not only the by-laws of the company, but also its char-

ter, and likewise would be in direct violation of certain statutes of the state. The court held that Rowan was not justified in relying on the representations of the field agent and stated (125 Kan. 710, 266 P. 101, at page 103): "Before he had a right to rely on the representations, he must have had a legally adequate reason to believe that the agent was authorized to make them." The situation there involved is radically different from that presented in the instant case. Here the articles of incorporation did not prohibit the line of activity outlined in the resolution. The statute under which the association had been incorporated was expressly amended to permit such activities. We are not here dealing with assumption of authority by a mere field agent, but with a formal resolution of the board of directors, authorizing its managing agents to enter into such contracts. The managing agents of the association, clothed with broad powers, represented to respondents that they had the authority in question. It is true, as urged by appellant, that W. P. Harkey in becoming a regular member, became chargeable with knowledge of the provisions of the by-laws, but he certainly cannot be charged with greater knowledge than that possessed by the board of directors and the managing agents of the association, and they certainly believed and represented that they had the power in question.

[6] Assuming that the oral contract was ultra vires the by-laws, the association can claim no greater rights by reason of that fact than any other corporation could claim under similar circumstances. The appellant claims that the law applicable to ultra vires contracts of corporations generally does not apply to cooperatives. Section 1219 of the Agricultural Code, St.1933, p. 264 (based on old Civil Code section 653xx, as added by St.1923, p. 232), provides that: "The general corporation laws of this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this chapter." No such conflicting or inconsistent provision in reference to the problem here under discussion has been referred to by appellant.

[7-9] It is quite clear that an ordinary commercial corporation could not secure the relief here asked by the appellant. The transactions here involved have been entirely executed, or at least fully performed by respondents. The association is not asking to be relieved of an executory contract claimed to be ultra vires. It is asking that as to the 55 acres the Harkeys be compelled to live up to and perform the obligations of a regular member contract—a contract which, as to that acreage, they admittedly never signed. Nor is the association seeking to rescind an ultra vires contract. It is asking that as to 1933 and 1934 the Harkeys be compelled to return moneys paid to them in exact accordance with the oral agreement of the parties, on the ground that they are bound by a regular member contract which admittedly they never signed or agreed to. The association has made no tender of a return of the material benefits it has received. As to the year 1935 it is seeking not only to enforce the provisions of a contract contrary to the one entered into, but is seeking to enforce that contract after its managing agents in writing had informed W. S. Harkey that he was released from all liability to deliver to the association, and that the association claimed no rights in his fruit. As early as the case of Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am.Dec. 300, it was held that the doctrine of ultra vires, at least in cases where the transaction did not violate the statutory law or public policy, did not apply to fully executed transactions. This is in accord with the general law on the subject. See 14a Cor.Jur. p. 319, § 2168 and cases therein cited. It is also settled in this state that where the contract is not malum in se or malum prohibitum the party who has fully performed (respondents here) may recover on the alleged ultra vires contract provided the other party (appellant here) has received the benefits of the transaction. Main v. Casserly, 67 Cal. 127, 7 P. 426; Kennedy v. Savings Bank, 101 Cal. 495, 35 P. 1039, 40 Am.St.Rep. 69; Rabbitt v. Union Indemnity Co., 140 Cal.App. 575, 35 P.2d 1066. Under such circumstances the doctrine of ultra vires can only be raised by the state. Chambers v. Security, etc., Bank, 51 Cal.App. 212, 196 P. 488; Bay City, etc., Ass'n v. Broad, 136 Cal. 525, 69 P. 225; McKee v. Title Insurance, etc., Co., 159 Cal. 206, 113 P. 140.

[10] On still another ground the doctrine of ultra vires in this and the other

cases is not available to the association. Under the circumstances here existing the association is clearly estopped from so challenging the 1924 resolution. In principle, the problem presented is closely analogous to that under discussion in Buford v. Florin Fruit Growers' Ass'n, 210 Cal. 84, 291 P. 170. In that case the cooperative association illegally amended its by-laws. Thereafter, on the representation of the executive officers of the association that the illegal amendment was in effect, a member changed his position to his injury. This court held that the principles of estoppel enunciated in section 1962(3) of the Code of Civil Procedure were properly applicable. That section in enumerating the conclusive presumptions, in subsection (3) provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." The fair, just, and equitable principles therein enunciated are clearly applicable here. See, also, Dool v. First Nat. Bank of Calexico, 209 Cal. 717, 290 P. 15; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 P. 930; Creighton v. Gregory, 142 Cal. 34, 75 P. 569.

[11] It should also be pointed out that in 1931 the Legislature, St.1931, p. 1802, added section 345 to the Civil Code, modifying the doctrine of ultra vires in this state. That section provides that the statement in the articles of the objects and powers of the corporation, shall, as between the corporation and its directors, officers, or shareholders, have the effect of a limitation upon the actual authority of the representatives of the corporation and then provides:

"Such limitations may be asserted in an action by a shareholder or at the suit of the state, to enjoin the doing or continuation of unauthorized business by the corporation and/or its officers in cases where third parties have not acquired rights thereby, or to dissolve the corporation, or in an action by the corporation or by the shareholders suing in a representative suit, against the officers or directors of the corporation for violation of their authority.

"No limitation upon the business, purposes or powers of the corporation or upon the powers of the shareholders, officers or directors, or the manner of exercise of such powers, contained in or implied by the articles * * * shall be asserted as between the corporation or any shareholder and any third person.

"Any contract or conveyance made in the name of a corporation which is authorized or ratified by the directors, * * * except as their authority is limited by law * * * shall bind the corporation, and the corporation shall acquire rights thereunder, whether the contract be executed or wholly or in part executory."

Even if the contract here involved were ultra vires the articles, under this section as it now reads, the doctrine would not be available to appellant.

[12] Appellant strenuously contends that to apply these just and equitable statutory principles to cooperatives will have disastrous effects on the affairs of such cooperatives; that the only basis upon which a cooperative can survive is equality of treatment of all of its members. The argument is without merit. The Legislature has determined otherwise. Since 1923 the Legislature, acting well within its proper sphere, has determined that it is in the public interest to permit such cooperatives to enter into such contracts as are here under attack. That is a legislative policy, not a judicial one.

The other arguments urged by appellant are all without merit.

The judgment appealed from is affirmed.

Justices HOUSER and LANGDON, deeming themselves disqualified, do not participate herein.

11 Cal.2d 212

STAFFORD et al. v. CALIFORNIA CANNING PEACH GROWERS.

S. F. 15839.

Supreme Court of California.

April 22, 1938.

Rehearing Denied May 19, 1938.

1. Reformation of Instruments ⚷18

Where fruit growers executed standard marketing agreement upon representation of executive officers of co-operative association that such agreement, plus oral understanding of parties that fruit growers would have status of renter members pursuant to resolution of board of directors, plus entry on association's books, would make growers renter members entitled to payment provided by resolution, and both parties believed that transaction would entitle growers to that payment, growers were not barred from having contract reformed by rule that written agreements will not be reformed to accord with a contemporaneous oral agreement not intended to be embodied therein.

2. Reformation of Instruments ⚷18

Where fruit growers and executive officers of co-operative association believed that effect of executing standard marketing agreement and entering into oral understanding that growers would be listed in books of association as renter members pursuant to resolution of directors of association would be to entitle growers to be paid as renter members under resolution, parties' mistake was a "mistake of law" entitling growers to reformation of contract to accord with intention of parties. Civ.Code, §§ 1578(1), 3399, 3401.

[Ed. Note.—For other definitions of "Mistake of Law," see Words & Phrases.]

3. Reformation of Instruments ⚷21

Where co-operative association, in order that it might obtain growers' peaches, induced growers to enter into marketing agreement by representing to them legal effect of their acts, and that information although given in good faith was false, growers were entitled to reformation of contract to accord with interpretation given them, since denial of reformation would in effect sanction a constructive fraud.

4. Agriculture ⚷6

Where marketing agreement entered into by fruit growers and co-operative association, as reformed so as to grant preference to growers as renters, was in accord with legislative policy of state, fact that contract as reformed was prohibited by by-laws of association did not entitle association to avoid it, on ground that it was ultra vires, and compel enforcement of standard marketing agreement by which parties did not originally intend to be bound.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by R. M. Stafford and another against California Canning Peach Growers, a nonprofit co-operative association, to reform a marketing contract and to recover the balance allegedly due plaintiffs under the contract as so reformed. Judgment for plaintiffs, and defendant appeals.

Judgment affirmed.

See, also, Cal.Sup., 78 P.2d 1137.

Agnew & Boekel and Carroll Single, all of San Francisco (Stanley J. Cook, of San Francisco, of counsel), for appellant.

Richard W. Young, of Oakland, amicus curiæ for Berkeley Bank for Cooperatives, Production Credit Corporation of Berkeley, Federal Intermediate Credit Bank of Berkeley, and Federal Land Bank of Berkeley.

Floyd B. Cerini and F. X. Kerner, both of Oakland, amici curiæ for Berkeley Bank for Cooperatives.

Seth Millington, of Gridley and Jerome D. Peters, of Chico, for respondents.

PER CURIAM.

The two respondents, R. M. and H. L. Stafford, are sons of T. H. Stafford. During the times here involved the father owned a ranch in Sutter county, about 100 acres of which were devoted to the growing of canning peaches. In 1932 and prior thereto, this ranch was operated by the father and these two sons under an oral agreement to split the profits and losses. Under this agreement the ultimate control of all questions of policy involving the ranch rested in the father, who was approaching 80 years of age. In 1932 the father became a regular member of appellant association and entered into the usual member's marketing agreement. During the seasons 1932, 1933, and 1934 the peaches grown on the 100 acres were delivered to the association and paid for by it on the basis provided in this agreement, that is, the pooled price less 5 per cent. and expenses. In 1933 one of the sons, R. M. Stafford, was elected a director of the appellant, although he was not a member of the association. The question of his qualifications as a director was discussed at various meetings of the board, but no formal action was taken in reference thereto. He participated in the deliberations of the board from December of 1933 to June of 1935.

The Staffords did not have sufficient capital to finance the ranch operations from year to year. Until the close of the peach season of 1934, and for many years prior thereto, the father had been financing operations by means of year to year loans advanced by a credit association in Marysville. There was also a deed of trust on the property. Late in the year 1934 the manager of the credit association informed the father that his association would not finance the 1935 operations as it had in the past; that because of the father's advanced age, the possibility of his death, and the difficulty of dealing with estates, the existing method of financing was not satisfactory to the credit association; that some other and different arrangement must be made in 1935.

R. M. and H. L. Stafford, and three other children of T. H. Stafford, consulted together and with their father, and with the then attorney for appellant association, as to the proper solution of their problem. It was finally agreed between the children and their father that a family corporation should be organized, and that this corporation should buy the orchard from the father. As part of this agreement it was decided that after such sale to the corporation it would be in the best interests of the corporation to withdraw from appellant association. The marketing agreement then in effect between the father and appellant expressly provided that upon a bona fide sale of the grower's orchard the agreement could be canceled. The trial court found, and the finding is not challenged, that this proposed sale to the proposed corporation was bona fide.

Thereafter, but before the new corporation was organized, R. M. Stafford informed the general manager of appellant, A. D. Poggetto, of the proposed new arrangement, and of the fact that the corporation, when it became the owner of the ranch, intended to exercise its privilege of canceling the marketing agreement, and that for the season of 1935 and thereafter the corporation would not sell its fruit to appellant. The appellant association desired, if possible, to retain the large tonnage produced on the Stafford ranch. After some discussion Poggetto, in an effort to retain this fruit for the association, suggested that, instead of forming a new corporation, the two sons, R. M. and H. L. Stafford, should lease the orchard from their father; that if they did so they would then be "renters," and as such eligible for admission to the association as "renter members" as defined in the 1924 resolution; that under this arrangement the association would buy the fruit for market price less 25¢ per ton; that if this were done the existing contract with the father would be canceled. This plan appealed to the Staffords. The two sons thereafter secured from their father a bona fide written lease for the years 1935 and 1936, and the association thereupon canceled the existing marketing agreement with the father. Before entering into a new marketing agreement, the Staffords inquired as to the procedure necessary to be followed to become renter members. They were informed by Poggetto and the assistant secretary Schmitt that the practice followed by the association was to have the renter member sign a regular members contract (which was the only form available); that the association would then enter the member on its books as a renter member; that this would bring the member under the terms of the resolution of January 15, 1924, and make him a renter member. On these representations the Staffords and the association executed the new marketing agreement in February, 1935. The trial court found, and the finding is unchallenged, that these "statements made to plaintiffs by said officers were believed by said officers to be true and were made for the purpose of having plaintiffs believe same, and to induce plaintiffs to execute said agreement, and the same and each of the same were believed by plaintiffs, and if it were not for such statements and representations, plaintiffs and each of them would not have executed said marketing agreement"; that both of the parties intended that by the signing of the marketing agreement the plaintiffs should become renter members and be paid for their fruit in accordance with the 1924 resolution; that when the agreement was executed the plaintiffs knew that in the past the association had entered into similar contracts with other renters and that the procedure followed in executing the contracts in the other cases was the same procedure followed by them; and that in the past the association had paid these other renter members in accordance with the intent and understanding of the parties.

In June of 1935, as already set forth in the Harkey Case, California Canning Peach Growers v. Harkey, Cal.Sup., 78 P.2d 1137, decided this day, the association elected a new board of directors. In August of 1935 the Staffords, in company with their attorney visited the new management to ascertain their rights under their contract. The association, while not denying that a renter member contract had in fact been entered into with the Staffords, stated that it would not recognize any such renter member contracts entered into by it through its old management unless ordered to do so by a court; that the Staffords could either deliver their fruit and be paid on an owner member basis and sue the association for the difference, or refuse to deliver at all; but, if they failed to deliver, the association would sue for breach of contract and ask for 50 per cent. of the market value of the crop as liquidated damages as provided in the marketing agreement.

The plaintiffs elected to and did deliver their 1935 crop to the association. They were paid only the amount per ton paid to owner members. They thereupon brought this action to reform the contract so as to have it declare the true intent of the parties, and to recover the balance due them under the contract as so reformed. The association by answer challenged plaintiffs' right to reformation, and likewise pleaded that if the contract were not reformed, the written contract between the parties was a regular members contract, and under the parol evidence rule, proof of any oral modifications should not be permitted. The association likewise pleaded that renter member contracts are ultra vires and not binding on the association. The association also sought declaratory relief as to the 1936 season. This last issue was removed from consideration by a stipulation of the parties that the Staffords would deliver their 1936 fruit to the association, and would be paid as owner or renter members depending upon the final outcome of this case.

The trial court found in favor of plaintiffs on all material issues. It ordered that the contract of February 20, 1935 should be reformed so as to call for payments as provided in the 1924 resolution, and entered its judgment accordingly. It is conceded by appellant that if the Staffords are legally entitled to be paid on a renter member basis for 1935 the amount of the judgment as fixed by the trial court is correct.

[1, 2] The first and main point urged by appellant is that no proper case for reformation has been presented by respondents, and that they should have been held to the terms of their written contract. It is appellant's contention that there was neither fraud, nor a mistake of law or of fact sufficient to warrant reformation. In this connection appellant seeks to bring this case within the well-settled rule that where parties reduce their agreement to writing, understand all of its terms, and are fully cognizant of its legal effect, reformation will not be granted to accord with a contemporaneous oral agreement not intended to be embodied in the written agreement and contrary thereto. Coneland Water Co. v. Nickalls, 75 Cal.App. 212, 242 P. 518; National Bank v. Exchange Nat. Bank, 186 Cal. 172, 199 P. 1; Horton v. Winbigler, 175 Cal. 149, 165 P. 423. That rule is not properly applicable to the facts here presented. The respondents executed the standard marketing agreement upon the representation of the executive officers of appellant that the execution of that agreement, plus the oral understanding of the parties, plus the entry on the books of respondents' names as renter members, plus the resolution of 1924, would have the legal effect of making respondents renter members within the meaning of that resolution, and entitled to payment as therein provided. The parties at the time they executed the contract may have made a mistake of law as to the legal effect of the transaction, but there is no dispute but that at that time both intended and honestly believed that the legal effect of the transaction was to entitle respondents to market price less 25 cents per ton for their peaches as provided in the 1924 resolution. At the moment of execution

and for some time thereafter, if either of the contracting parties had been asked as to their intention and legal relationship they would have agreed that this was their intention. The contracting parties intended that the resolution of 1924 should be and believed it was a part of their contract, and intended and believed that it should control the provisions as to amount and method of payment contained in the standard marketing agreement. There is no doubt that the mistake was a mutual one. The factual situation thus presented falls directly within the language and intent of the statutes providing for reformation, and within the cases interpreting those sections.

Section 3399 of the Civil Code provides that: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Section 3401 of the Civil Code provides that: "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." The principles announced in these statutes have long been the law of California without special reference to the Code sections. In Murray v. Dake, 46 Cal. 644, a landlord signed a lease with his tenants which he knew expressly referred to the leased premises as "all" of a designated building. At the time the lease was executed the landlord refused to sign without a reservation to himself of a second floor which he contemplated adding to the building during the period of the lease. The tenants orally stated that that was their understanding of the lease, and that they agreed the lease should not cover the second story when it was built. The landlord added the additional floor and moved in, whereupon the tenants brought this action for ejectment. The landlord asked that the lease be reformed so as to express the true intent of the parties. In holding that these facts presented a proper case for reformation, the court first pointed out that the evidence showed (as it does in the instant case, the trial court so finding) that had it not been for the assurances of the tenants as to their intent, the landlord would not have signed the lease, and then stated: "It was not, however, a case of mistake as to the contents of the lease, for the defendant knew at the time what he was signing, though he may not have known the legal effect of the words used. Nor does it appear that either of the lessees had at that time any fraudulent intention to use the lease for any purpose other than what was named and agreed to"—that intent, the court pointed out, was formed later. The court continued as follows: "This presents the question whether a Court of equity will interfere to prevent the fraudulent use of a paper for a purpose not contemplated at the time it was made, but where there was no mistake or fraud in its execution. There is some conflict in the authorities upon the question, but we think the better opinion is that relief will be granted." After a review of some of the cases, the court concluded that: "To permit the plaintiff here to avail himself of this lease, in violation of his express agreement, to recover the property in controversy, would be to uphold and sanction fraud and bad faith."

It is true that there are cases from other states refusing reformation under such circumstances, but we think the rule of the Murray Case is a proper and salutary one, and should be followed. It has frequently been approved. See particularly Fidelity & Casualty Co. v. Fresno Flume, etc., Co., 161 Cal. 466, 119 P. 646, 37 L.R.A.,N.S., 322; Holmes v. Anderson, 90 Cal.App. 276, 265 P. 1010.

The instant case presents a stronger factual situation for the application of the above rule than did the Murray Case. Here both parties, it is true, knew that they were signing a contract calling for a pooled price less 5 per cent. and expenses, but both honestly believed and intended that the legal effect of that instrument, when considered in view of the agreement to list respondents on the books as renter members, and in view of the resolution of 1924, was to provide for market price less 25 cents per ton. Both parties knew that many such contracts had been entered into by the association, and that the association always had considered that the provisions of the 1924 resolution were part of the contract, and controlled the subject of payment. This clearly constitutes a mistake of law within the meaning of section 3399 of the

Civil Code, as such mistake of law is defined in section 1578(1) of that Code.

[3] Moreover, even if the case was not one involving a mistake of law, it presents a situation where to deny reformation would be to sanction a fraud. It is true the court below made no express finding of fraud, but it did find the facts from which such fraud may be inferred. It found that the association took it upon itself to represent to respondents the legal effect and consequences of their acts. It purported to interpret the contract. This information, although given in good faith, was false. To now condone the use of the contract for purposes other than those represented would be to sanction a constructive fraud. In our opinion the trial court properly reformed the contract.

[4] The appellant next urges that the contract as reformed is ultra vires and void. The trial court found it was not ultra vires, but also found if it were ultra vires appellants are estopped to deny its validity. As already held in the Harkey Case, supra, the by-laws of the association did not authorize and in fact prohibited the type of transaction here under discussion. But as also pointed out in that case, the resolution of 1924 authorizing such transactions did not violate the articles or any principle of public policy—in fact, it was in exact accord with the legislative policy of the state. As to the year 1935, which is the only year involved on this appeal, the association is not seeking to be released from an executory contract claimed to be ultra vires, but has insisted that respondents deliver their fruit upon threat of an action for breach of contract and of a 50 per cent. liquidated damage claim. The association does not seek rescission with its consequent restoration of material benefits received by it. It is seeking to enforce the terms of the standard marketing agreement, a contract—in view of the reformation—that we must hold was never executed by the parties. What was said in the Harkey Case on this phase of the controversy is equally applicable here. On the grounds therein stated it is held that appellant's contention now under discussion lacks merit.

The other points urged by appellant are without merit. For the foregoing reasons the judgment appealed from is affirmed.

Justices HOUSER and LANGDON, deeming themselves disqualified, do not participate herein.

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11 Cal.2d 221

CALIFORNIA CANNING PEACH GROWERS v. WILLIAMS et al.

Sac. 5179.

Supreme Court of California.

April 22, 1938.

Rehearing Denied May 19, 1938.

1. Evidence ⚷448

Under statutes relating to admissibility of evidence in construing contracts and relating to interpretation thereof, clear and unambiguous words of a written contract cannot be varied by oral testimony in absence of fraud, mistake, or accident, and ordinarily parol limitations on operation of contract cannot be shown. Code Civ.Proc. §§ 1856, 1859–1861; Civ.Code, §§ 1625, 1636, 1640, 1647.

2. Evidence ⚷448

Where ambiguity exists in written contract, or provisions thereof are conflicting, oral testimony is admissible to explain such ambiguity or conflict. Code Civ.Proc. § 1856.

3. Evidence ⚷450(5)

The parties to a written contract may show by parol that terms appearing therein after signature, or in other places on document, or where ordinarily they would not be part of contract, were in fact intended to be a part thereof.

4. Evidence ⚷450(5)

Where marketing agreement entered into by fruit grower and co-operative association bore words "renter member" on cover thereof, testimony of signers, that they intended that term "renter member" should be a part of contract, was admissible. Code Civ. Proc. §§ 1856, 1860.

5. Evidence ⚷457

In suit involving rights of parties under marketing agreement entered into by fruit grower and co-operative association, where both signers testified that they intended that term "renter member" appearing on cover of contract should be a part thereof, oral testimony was admissible to explain meaning of term "renter member." Code Civ. Proc. § 1861; Civ.Code, §§ 1644, 1645.

6. Evidence ⚷455

Previous and contemporaneous transactions between parties may be considered in ascertaining sense in which words were used by them in contract.

7. Agriculture 🔑6

Where fruit grower was to receive a different price for his peaches under oral understanding with co-operative association than was provided by written contract signed by parties, and obligations under oral understanding had been fully performed by both parties, the oral agreement constituted a modification of the written contract and precluded association from recovering payments made by it under oral contract. Civ. Code, § 1698.

8. Agriculture 🔑6

That oral marketing agreement, entered into by fruit grower and co-operative association, was ultra vires the by-laws of association in granting preference to such grower who was a renter, did not entitle association to avoid agreement where it had been fully executed, since doctrine of ultra vires was not available as to such an agreement.

9. Agriculture 🔑6

A co-operative association could not recover from fruit grower payments made under oral marketing contract, on ground that contract, which was inconsistent with written contract signed by parties, was ultra vires, where parties never intended to be bound by written contract, and, in absence of any contract, association would be liable for a larger amount than it had paid.

10. Agriculture 🔑6

That fruit grower, who had entered into marketing agreement with co-operative association relating to one of fruit ranches rented by him, was a director and former officer of association, did not change his rights under contract in absence of any showing that he abused his confidential position.

11. Trial 🔑395(5)

Where co-operative association claimed that agreement between association and fruit grower, under which fruit grower as a renter was to obtain a preference, rested solely in parol and could not be shown without violating parol evidence rule, trial court's finding that directors of association passed resolution authorizing such a preference, and that pursuant thereto association and grower entered into a written contract, was a proper finding of ultimate fact on application of parol evidence rule.

12. Trial 🔑397(1)

Findings which were in exact accord with issues framed by pleadings and which covered every ultimate fact were sufficient, notwithstanding that trial court failed to make express finding concerning validity of resolution passed by plaintiff's directors.

13. Appeal and error 🔑1122(2)

Where facts were not substantially in dispute, failure of trial court to make findings on certain issues could avail nothing on appeal, in view of reviewing court's power to make additional findings of fact. Code Civ.Proc. § 956a.

14. Appeal and error 🔑1043(6)

The refusal of trial court to admit depositions of defendants, who were called as witnesses by plaintiff under statute authorizing examination of adverse parties and were fully examined, was not reversible error, where no attempt was made to use depositions during adverse examination for impeachment purposes, and depositions contained nothing which would cause reviewing court to change its views on case. Code Civ. Proc. § 2055, and § 2021, as amended by St. 1935, p. 394; Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by the California Canning Peach Growers, a nonprofit co-operative association, against E. R. Williams and another to recover money allegedly due from defendants, wherein the defendants filed a counterclaim and cross-complaint. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

For prior opinions, see 69 P.2d 893; 70 P.2d 650.

See, also, Cal.Sup., 78 P.2d 1137.

Agnew & Boekel, Carroll Single, and Stanley Cook, all of San Francisco, for appellant.

D. Hadsell and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, Vernon F. Gant, of Modesto, and Brown & Rosson, of Oakland, for respondents.

Richard W. Young, of Oakland, amicus curiæ for Berkeley Bank for Cooperatives, Production Credit Corporation of Berkeley, Federal Intermediate Credit Bank of Berkeley, and Federal Land Bank of Berkeley.

Floyd B. Cerini and F. X. Kerner, both of Oakland, amici curiæ for Berkeley Bank for Cooperatives.

PER CURIAM.

This action was commenced by the association against E. R. and Frances O. Williams, husband and wife, on two common counts, the first alleging that between designated dates the plaintiff at the special instance and request of defendants furnished, paid, and laid out to and for the use and benefit of the defendants a designated sum of money which defendants agreed to repay with interest; and the second alleging the same indebtedness due from the defendants to plaintiff on an open and current book account. Defendants answered denying the allegations of the complaint, and defendant E. R. Williams likewise filed a counterclaim and cross-complaint. The issues raised by this last-named pleading are not involved on this appeal.

On the trial it developed that the action was in fact one by the association to recover back from defendants certain alleged overpayments made to Mr. Williams for his peaches grown in 1934 on the Merci ranch in Stanislaus county. It is important to note that the present action involves only the Merci ranch, and only the season 1934, for the reason that there is another action here pending in which the Williams are defendants, together with A. D. Poggetto, and in which not only the Merci ranch for 1934 but also several other ranches and other seasons are involved. California Canning Peach Growers v. Williams, Poggetto and Williams, Cal.Sup., 78 P.2d 1161.

At the trial it developed that the association had purchased the Williams' fruit for 1934 from the Merci ranch and had paid for it on a renter member basis—market price less 25 cents per ton. The theory of appellant association is that the only contract Williams had with the association for that year was a regular marketing agreement calling for the pooled price less 5 per cent. and expenses and that he was overpaid the amount that it seeks to recover in this action. The arithmetic of the controversy is not in dispute. It was stipulated that, if defendant E. R. Williams was entitled to be paid as a renter member, he had been overpaid the sum of $461.28, but if he should have been paid as were owner members he had been overpaid in the sum of $2716.27. The sum of $461.28 was for fertilizer purchased by Williams from the association which the association failed to deduct from his 1934 payments, and which Williams admits he owes. The trial court determined that no cause of action at all had been proved against Mrs. Williams, and that as to Mr. Williams he was legally entitled to payment as a renter member. Accordingly, judgment was entered in Mrs. Williams' favor, and against Mr. Williams in the sum of $461.28, together with interest and costs. From this judgment the association prosecutes this appeal.

The basic facts are not substantially in dispute. Williams was one of the organizers of the appellant association. He was a director from 1922 to 1935, and for several years was vice president. From 1922 to 1928 he owned several peach orchards. These he signed up with the association under regular marketing agreements and was paid accordingly. In 1928 he lost, through foreclosure, all of his owned orchards. In 1929 and thereafter he leased from their owners various peach orchards. These he signed up with the association under what he believed were renter member contracts as defined by the January 15, 1924, resolution. As to all these leased orchards he was paid market price less 25 cents per ton for his peaches.

In 1933 he leased the Merci orchards from its then owner. On May 17, 1933, he entered into a written contract with the association in reference to this orchard, and was paid for that season under this contract market price less 25 cents per ton. In 1934 Williams again leased the Merci orchard from its new owner, the Federal Land Bank in Berkeley, whereupon the association and Williams agreed to renew the contract of 1933.

The contract that is here involved was the printed form of the regular marketing agreement, and expressly provided that the price to be paid for the peaches was the pooled price less 5 per cent. and expenses. The contract was executed on behalf of the association by F. B. Schmitt, assistant secretary, and one of the managing agents of appellant. Schmitt, as a witness on behalf of appellant, testified that at the time the contract was signed he wrote on the cover of the contract near the bottom the words "Renter Member" and the word "None." This last word was written over the words "Membership Fee, $5.00, Organization ——, Total ——," printed on the cover of the contract. Schmitt also testified that before the contract was signed Williams had come to him and stated that he had rented or could rent the Merci orchard; that he would sign this ranch with the association only on condition he would do so as a renter member; that the contract was thereafter executed on the definite understanding that Williams was signing a renter member contract entitling him to payment in accordance with the 1924 resolution; that the words "Renter Member" appearing on the cover of the contract were intended by him to mean that Williams was in fact a renter member and that the resolution of 1924 was to control the amount of payment. Williams corroborated Schmitt as to the circumstances surrounding the execution of the contract, and as to the intent of the parties. The evidence is uncontradicted that the association through Schmitt, and Williams on his own behalf, believed and intended that the legal effect of the transaction was to make Williams a renter member entitled to market price less 25 cents per ton for his fruit, and that when the words "renter member" were placed in the contract by the contracting parties to them those words had that meaning. The evidence also shows that when the contract was filed with the association, it was given a distinctive number—7001. Schmitt testified that regular member contracts were numbered under 4000; that the larger numbers were reserved for renter members; that the number 7001 on the Merci contract would immediately indicate to the employees of the appellant that Williams was entitled under that contract to be paid market price less 25 cents per ton. It also appears that when contract 7001 was filed by appellant the words "Renter Member" were typed on the cover near the top immediately under Williams' name so that it could easily be identified as a renter member contract in the vertical files of appellant. Also the records of appellant indicate that after Williams' name appearing therein there was written the words "renter member." This was done, according to Schmitt, to indicate to the employees of appellant that the basis of payment under this contract was market price less 25 cents per ton.

The evidence also shows that Schmitt on behalf of the association entered into many similar renter member deals with other renters; that the uniform custom and practice of the association was to have such renters sign the regular marketing agreement with the words "renter member" written thereon; that it was explained to such renters that this was the procedure necessary to be followed in order to make them renter members entitled to receive market price less 25 cents per ton for their fruit as provided in the 1924 resolution; that such renters would not have signed up as regular members; that from 1924 until the new board of directors was elected in 1935 the association so interpreted its obligations under such contracts and paid such renters market price less 25 cents per ton for their fruit.

As already indicated, Williams was paid in 1933 in accordance with the understanding of the parties. In 1934 he was paid on the same basis, but was overpaid $461.28, the association failing to deduct the selling price of some fertilizer purchased by him. When he received his 1934 payments he believed, of course, that, as in the year 1933 (and other years), he was being paid in accordance with the agreement of the parties, market price less 25 cents per ton. He also testified, and his testimony is not contradicted, that other than the checks themselves, many of which at his order were delivered directly to the landlord and other persons, he had never received any statement of account from the association. He testified that he had confidence in the association's officers and employees and left the matter of bookkeeping and payment to them.

It is obvious that the trial court's decision is in exact accord with the mutual understanding, intent, and agreement of the parties. Appellant, while necessarily admitting that fact, contends that such mutual understanding, intent, and agreement cannot be given effect for the reason that the written contract provides for the pooled price less 5 per cent. and expenses, and contends that the agreement to pay market price less 25 cents per ton rests solely in parol, and that to show its existence violates the parol evidence rule. We are of the opinion that the showing of the agreement to pay market price less 25 cents per ton did not violate the parol evidence rule, for several reasons. In the first place it is our opinion that the written agreement, properly interpreted, provided for such payment. Before directly discussing this conclusion reference should be made to certain pertinent code sections.

Section 1856 of the Code of Civil Procedure provides that:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud."

Section 1860 of the Code of Civil Procedure, referred to in section 1856, provides that: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." See, also, section 1647 of the Civil Code.

Section 1861 of the Code of Civil Procedure provides that: "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."

See, also, sections 1644 and 1645 of the Civil Code.

Section 1859 of the Code of Civil Procedure and section 1636 of the Civil Code require the court in interpreting a contract to enforce the intent of the parties, if possible.

Section 1625 of the Civil Code provides that: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Section 1640 of the same Code provides that: "When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

[1, 2] Other sections could be referred to embodying the same or similar principles. Under these sections, in the absence of fraud, mistake, or accident, the clear and unambiguous words of a written contract cannot be varied by oral testimony—ordinarily parol limitations on the operation of the contract cannot be shown. But it is equally well settled that where ambiguity exists, or where the provisions of a contract are conflicting, oral testimony is admissible to explain such ambiguity or conflict.

[3, 4] Without now considering whether there was a mutual mistake of law as to the legal effect of the instrument sufficient to permit the introduction of oral evidence (a point discussed, at some length in the Stafford Case, Stafford v. California Canning Peach Growers, Cal.Sup., 78 P. 2d 1150, decided this day, in a different connection), in the present case, the parties placed on the cover of their written contract with intent that they should be a part of such contract the words "Renter Member." It has long been the rule in California that the parties to a written contract may show by parol that terms appearing therein after the signature, or on other places on the document where they ordinarily would not be part of the contract, were in fact intended by them to be part of the contract. Verzan v. McGregor, 23 Cal. 339; Berry v. Kowalsky, 95 Cal. 134, 30 P. 202, 29 Am. St.Rep. 101; Spotton v. Dyer, 42 Cal.App. 585, 184 P. 23; Shelley v. Hart, 112 Cal. App. 231, 297 P. 82; Storm & Butts v. Lipscomb, 117 Cal.App. 6, 3 P.2d 567. Both of the parties that signed the contract testified that it was their intent that the terms "renter member" should be a part of the contract. It is not open to question, under the above cases, that this was properly shown by parol.

[5] Once this hurdle has been overcome it is equally clear that the phrase "renter member" may be explained by oral testimony. Obviously such a phrase creates an ambiguity. The phrase indicates that it was placed on the contract to distinguish this type of contract from other contracts dealing with other types of members. If so, why was it done and what was intended? Both of the parties who signed the contract testified that the phrase had a special, technical, definite, and peculiar meaning to them; that it meant that the new member was to become a renter member as defined in the resolution of 1924; that the provisions of that resolution were intended to be part of the contract and to override the provisions in the contract as to the manner of payment. Such a situation is expressly covered by statute. Section 1861 of the Code of Civ. Proc., supra; also sections 1644 and 1645 of the Civ. Code. See, also,

Shean v. Weeks, 176 Cal. 592, 169 P. 231; Gianelli v. Globe Grain & Milling Co., 48 Cal.App. 103, 191 P. 720.

[6] Not only did the parties testify that the phrase had this technical meaning to them, but, in view of the ambiguity thus created, it is also of considerable evidentiary importance that between 1929 and 1934 the two parties had entered into identical contracts and had construed them as here contended for by respondents. The very contract here involved had been so construed by both parties for the year 1933. It also appears that this construction was placed on many other contracts of other renters by appellant during the period 1924 to 1935, and that this was known by Williams. Previous and contemporaneous transactions may be considered to ascertain the sense in which the parties to a writing used particular words. Cabrera v. Thannhauser & Co., 183 Cal. 604, 192 P. 45. The rule of practical construction is too well settled to require further comment.

[7] There is another and complete answer to appellant's contention. If we assume that the contract to pay market price less 25 cents was entirely oral, and that the written contract provided for the pooled price less 5 per cent. and expenses, nevertheless appellant is not now in a position to recover payments made under the oral contract. Section 1698 of the Civil Code permits the parties to a written contract to modify the same by an executed parol agreement. That section provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The evidence in the instant case demonstrates that respondent has fully performed the terms of the oral contract for the year 1934. It also appears by stipulation that not only has the association fully performed by paying to respondent the full amount due him under the alleged oral contract, but has in fact overpaid him. The money that was paid to respondent by the association was paid with the intention of performing the agreement to pay respondent market price less 25 cents per ton. The fact that on the books of the company the payments made to respondent and other renters in excess of those paid owner members were labeled "advances" is immaterial. Respondent had nothing to do with the keeping of the books nor did he know how they were kept. The uncontradicted evidence shows that this practice was followed in the case of every renter member, had been followed for many years, and was employed merely as a bookkeeping convenience. Appellant urges that the general account between the parties was still open. That may be true as to the general account, but the Merci ranch deal for 1934 was a separate and distinct transaction covered by a separate contract, and as already indicated has been fully executed. Under such circumstances even if the agreement to pay the market price less 25 cents per ton were entirely oral, having been fully executed, it would constitute a modification of the written agreement.

[8] Appellant next urges that the resolution of 1924 was ultra vires and illegal. This contention has been fully considered in the Harkey, California Canning Peach Growers v. Harkey, Cal.Sup., 78 P.2d 1137, and Stafford Cases, decided this day. What was there said need not be repeated in this opinion. For the reasons set forth in those opinions it is concluded that even though the contract was ultra vires the by-laws the appellant is bound thereby. It should be particularly noted that the contract here involved has been fully executed, and as to such contracts the doctrine of ultra vires is not available.

[9] There is another factor in reference to the doctrine of ultra vires that should be referred to. We have already held, in discussing the parol evidence rule, that the only contract signed and agreed to by the parties was a contract to buy and sell the Merci orchard fruit for market price less 25 cents per ton. If that contract could be voided by the association because it was ultra vires, even then the association could recover nothing in this action. The position of appellant has two aspects: First, it seeks to avoid the actual contract of the parties; and, second, it seeks to substitute for it an owner contract—a contract never agreed to. In other words, the association is seeking not only to destroy a contract the parties did make and did perform, but also to substitute in its place a contract the parties did not make and did not perform. If the contract the parties did make were destroyed, the courts have no power to make a new contract for them. If the only contract between them were destroyed, then it would appear that the association would be liable on a quantum meruit—that is, market price—an amount in excess of that which it has paid respondent.

[10] Appellant next urges that Williams was a director of appellant and a former vice president, and that as to him a different rule should apply than would be applied to third parties dealing with the corporation. There is no evidence that Williams in reference to the transaction here involved in any way took advantage of his position of trust and confidence. The Merci ranch deal for 1934 was not an unusual one. It was a normal, ordinary business contract offered to all renters indiscriminately. The fact that he had been an owner member or director or officer does not affect the Merci ranch deal for 1934. Appellant concedes that a regular member or director or officer who had signed up one or more orchards with the association was under no legal or moral obligation to place other orchards owned or rented by him in the association. Each orchard is covered by a separate contract. As concerns Williams' freedom of choice in reference to the Merci orchard it could make no difference whether he was a director, vice president, or owner member of the association. He was as free as any other grower or renter to bargain with the association in reference to that orchard. There is no evidence that in so doing he abused his confidential position. He entered into the same deal on exactly the same terms that were offered to renters generally, and that deal was not clandestine nor secret, but was authorized by a formal resolution of the board of directors.

[11-13] The appellant urges that the trial court committed reversible error in failing to find on certain issues. It is first contended that there is no finding on the application of the parol evidence rule. The trial court did find that the resolution of 1924 was passed by the directors and that pursuant thereto appellant and Williams entered into a "written contract" to buy and sell the Merci orchard fruit for 1934. That is a proper finding of the ultimate fact, and is in accord with the interpretation of the contract found in this opinion. It is next contended that the trial court failed to make an express finding as to the validity of the 1924 resolution—that the findings do not disclose whether the trial court found it valid or invalid, and if invalid upon what ground such invalidity does not affect the contract. It is true that the findings do not disclose the theory of the trial court in reference to the resolution. The findings, however, are in exact accord with the issues framed by the pleadings. Every ultimate fact was covered by findings. That is all that is required. Moreover, under the circumstances here involved where the facts are not substantially in dispute, if findings were required on these issues it would avail the appellant nothing in view of the power conferred on this court by section 956a of the Code of Civil Procedure.

[14] The appellant next complains that the trial court committed reversible error in refusing to admit into evidence the depositions of defendants alleged to have been taken under section 2021 of the Code of Civil Procedure, as amended by St.1935, p. 394. Both defendants were present in court at the time of the trial. Both were called as witnesses by plaintiff under section 2055 of the Code of Civil Procedure and fully examined. In addition Mr. Williams was called as a witness by defendant and cross-examined by plaintiff. No attempt was made by plaintiff to use the depositions during such examinations for impeachment purposes. Assuming that the depositions offered were taken under section 2021 of the Code of Civil Procedure, as amended by St. 1935, p. 394, and assuming without deciding that under the rule enunciated in Hurtel v. Albert Cohn Inc., 5 Cal.2d 145, 52 P.2d 922, such depositions should have been admitted in evidence, the error is not a reversible one. We have read the proffered depositions and find nothing contained therein that would cause us to change our views as to the legal effect of the transaction here involved. Under Article 6, section 4½, of the Constitution, the error, if any, does not require a reversal.

As in the Harkey and Stafford Cases some point is here made by appellant that the renter member deals were kept secret, and from that fact appellant seeks to indulge in unfavorable inferences. The point has been fully discussed in the prior cases. As in those cases, the evidence in the present case (even if the point were important) is against appellant's contention.

The other points urged by appellant are without merit.

The judgment appealed from is affirmed.

Justices HOUSER and LANGDON, deeming themselves disqualified, do not participate herein.

11 Cal.2d 233

CALIFORNIA CANNING PEACH GROWERS v. WILLIAMS et al.

S. F. 15906.

Supreme Court of California.

April 22, 1938.

Rehearing Denied May 19, 1938.

1. **Agriculture** 🔑6

Evidence relating to circumstances in connection with passage of resolution by directors of co-operative association granting special preference to renters selling fruit to association established that resolution had been passed and had not thereafter been amended, rescinded, or repealed.

2. **Appeal and error** 🔑878(2)

The defendants could not on plaintiff's appeal question correctness of finding contrary to their contention.

3. **Evidence** 🔑457

Where words "renter member" were written on cover of marketing agreements entered into by fruit grower and co-operative association, oral testimony was admissible in suit involving rights of parties under agreements to explain meaning of term "renter member" by showing existence of oral understanding that grower, as a renter, was to receive higher prices than those provided for in written agreement.

4. **Agriculture** 🔑6

Where understanding between fruit grower and co-operative association under which grower as a renter was to receive preferential treatment, if oral, had been fully performed, written marketing agreements executed by grower and association were deemed to have been modified by oral understanding.

5. **Agriculture** 🔑6

That one of fruit growers entering into marketing agreement with co-operative association was a director and former officer thereof, and other grower was general manager, did not entitle association to avoid renter member contracts which were similar to contracts entered into with other renters and were entered into with those growers pursuant to formal resolution of directors of association, in absence of any showing that growers abused their position of trust in consummation of contract.

6. **Agriculture** 🔑6

Where preferential treatment authorized by resolution of directors of co-operative association was to be granted only to renters and not to owners, fruit growers who were copartners in operation of fruit ranch were not entitled to benefits of renter member contract, but were entitled to be paid for fruit from that ranch only under regular marketing agreement customarily entered into by association and owner members.

7. **Set-off and counterclaim** 🔑28(1)

Sums owing by co-operative association to fruit grower in connection with marketing contracts were proper offsets against debt owing to association by fruit grower who had been overpaid for fruit delivered from one of his fruit ranches.

8. **Set-off and counterclaim** 🔑24

Amounts improperly claimed by fruit grower from co-operative association, on theory that he was entitled to be paid as a renter member for fruit sold from ranch which he was operating as an owner, were improperly allowed as an offset against grower's debt to association.

9. **Agriculture** 🔑6

A fruit grower was liable to co-operative association for amounts improperly paid him for fruit from one of his ranches in excess of amount to which he was entitled.

10. **Agriculture** 🔑6

A fruit grower, who had been paid by co-operative association for his fruit as a renter member an amount in excess of that to which he would have been entitled if he were an owner member, would be liable to association for overpayment if it should be found that he was a partner of owner.

11. **Appeal and error** 🔑1172(1)

Where evidence in reference to one item involved in marketing transactions between fruit grower and co-operative association was highly unsatisfactory, retrial of that issue was required in connection with retrial of other issues.

12. **Agriculture** 🔑6

Where marketing contract between fruit grower and co-operative association was terminated in accordance with terms thereof by sale of fruit ranch by owner to grower's wife, association was not entitled to liquidated damages for grower's failure to deliver fruit to association from that ranch for following season.

13. Agriculture ⚷6

Evidence that fruit grower's wife purchased ranch, which grower and another party had been operating, with borrowed money, and that grower did not contribute anything towards its purchase, established that sale to wife was bona fide as respects co-operative association's right to liquidated damages for subsequent failure to deliver fruit to association from ranch under marketing agreement between grower and association.

14. Agriculture ⚷6

In suit by co-operative association against fruit grower to recover amounts allegedly due in connection with marketing transactions, court was required to consider all items owing by grower to association, and what credits were properly allowable to grower, in arriving at a proper accounting.

◆

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by the California Canning Peach Growers, a nonprofit co-operative association, against Frances O. Williams and others to recover money allegedly owing to association by defendants in connection with marketing of fruit through association. Judgment for defendants, and plaintiff appeals.

Judgment reversed with instructions.

See, also, Cal.Sup., 78 P.2d 1137.

Agnew & Boekel and Carroll Single, all of San Francisco (Stanley J. Cook, of San Francisco, of counsel), for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Brown & Rosson, of Oakland, and Vernon F. Gant, of Modesto, for respondents.

Richard W. Young, of Oakland, amicus curiæ for Berkeley Bank for Cooperatives, Production Credit Corporation of Berkeley, Federal Intermediate Credit Bank of Berkeley, and Federal Land Bank of Berkeley.

Floyd B. Cerini and F. X. Kerner, both of Oakland, amici curiæ for Berkeley Bank for Cooperatives.

PER CURIAM.

This action was commenced by the California Canning Peach Growers against Frances O. Williams and E. R. Williams (husband and wife) and A. D. Poggetto to recover from them $21,333.12 (reduced at the time of trial by stipulation to $21,226.66) alleged to be owing to the association by these parties. In addition the association seeks to recover liquidated damages for failure on the part of defendants to deliver to the association their 1935 crop from the Empire ranch. The complaint sets forth the entire theory of plaintiff's cause of action in detail. Poggetto is sued as a silent partner, coadventurer, or undisclosed principal of the Williams. The action covers all of Williams' activities with the association for many years, covers many separate contracts and many different ranches.

The action has been tried twice. At the end of the first trial judgment was entered in Mrs. Williams' favor but against Mr. Williams and Poggetto in the sum of $21,226.66. On the issue of liquidated damages for nondelivery from the Empire ranch for 1935 the court found in favor of all defendants. The basis of the trial court's decision was that Poggetto was a partner of Williams in the various transactions described in the complaint; that the only contracts held by Williams and Poggetto were regular marketing agreements; that the evidence tending to show that the parties intended to enter into renter member contracts was inadmissible for the reason that it violated the parol evidence rule; and that the resolution of January, 1924, purporting to authorize the renter member contracts, was ultra vires and illegal. Thereafter, on motion of Mr. Williams and Poggetto, the trial court granted a new trial as to them. A new trial, before the same judge, was thereafter had, the parties stipulating that the cause could be tried on the record of the first trial. This second trial resulted in the judgment now appealed from that the association take nothing from defendants Mr. Williams and Poggetto.

The judgment in favor of Mrs. Williams has become final. The association did not move for a new trial after judgment was entered in her favor at the conclusion of the first trial. No appeal has been taken from that judgment. The rights of the association as against her are therefore not involved on this appeal.

No necessity exists for reviewing in detail each of the contracts between Williams and the association involved on this appeal. Williams was one of the organizers of appellant, was a director from 1922 to 1935, and was at one time vice-president. Poggetto during all of the times here involved was general manager of appellant. From

1922 to 1928 Williams owned several peach orchards. As to each of such orchards he signed a regular marketing agreement with the association became an owner member, and was paid for his fruit accordingly. In 1928 he lost the ownership of his various ranches through foreclosures. Beginning in 1929 and continuing thereafter he rented various orchards and signed them up with the association under what he and the association believed were renter member contracts. It is appellant's theory that all of the deals subsequent to 1928 were regular marketing contracts, and that payments made in excess of the amounts called for by such contracts are recoverable by the association.

The evidence shows that in 1929 the association was badly in need of peaches, a heavy frost having destroyed a large portion of the expected crop. Williams discovered that the Empire ranch in Stanislaus county was unaffected by the frost, contained a large acreage of growing peaches, and was for sale. Being unable to finance the deal himself Williams asked Poggetto if he would like to buy the Empire ranch, Williams to operate it. Poggetto agreed and purchased the ranch. Williams then entered into a renter member contract with the association, Schmitt signing on behalf of the association. The procedure followed was substantially that described in the Williams Case, California Canning Peach Growers v. Williams, Cal.Sup., 78 P.2d 1154 decided this day—that is, a regular marketing agreement was executed with the words "Renter Member" written on the cover, the understanding being that the renter member was to receive market price less 25 cents per ton for his fruit. Poggetto financed operations.

During the years 1929 to 1934 (1932 being excepted) Williams rented or leased other orchards not owned by Poggetto, and as to each of them entered into similar contracts with the association. In all of these deals he was financed largely by Poggetto. On most of these deals he was paid on a renter member basis as defined in the 1924 resolution. After the new directors were elected in 1935, and the change in policy at least as to some renter members adopted, this action was brought. The major portion of the $21,226.66 sued for ($14,101) is for the recovery of alleged overpayments paid to him on the theory that he was a renter member. $5,268.55 is for an amount owed by Williams to the association for the year 1927 growing out of the operation of the Sunnydale ranch then owned by him, which amount was apparently written off as a bad debt by mistake. The balance is for smaller items not necessary to enumerate.

[1] The trial court made elaborate findings. It found the facts in reference to the difficulties facing the association in 1923, and the circumstances surrounding the passage of the renter member resolution of January 15, 1924, substantially as such facts were found in the other three cases involving this association and already disposed of. These facts need not be recounted here. The court found that this resolution was in fact passed in that year and has never since been amended, rescinded, or repealed. Appellant challenges this finding, contending that the evidence introduced by it indicates that the resolution was never passed and that the minutes purporting to show its passage are forgeries. Evidence was introduced by appellant that the minutes purporting to cover the January 15, 1924, meeting of the board of directors had been recently retyped, but this was admitted and fully explained by respondents' witnesses. Several of the members of the board of directors who were supposed to have voted for the 1924 resolution testified that they "could not remember" having voted for the resolution. Respondents introduced considerable evidence on this issue, and the trial court has found in accordance therewith. In our opinion the overwhelming weight of the evidence establishes that the resolution was in fact passed and that the minutes correctly state the proceedings of the board of directors on January 15, 1924.

The trial court also found that after the passage of the resolution, pursuant thereto, the field men of the association were instructed to solicit renter members; that during the period 1924 to 1935 many such members were solicited and signed with the association as renter members; that such members, during such period, were paid in accordance with the 1924 resolution; that during this period the renter member situation was frequently discussed by the members of the board of directors; that the fact that the association would and did make contracts with renters in accordance with the 1924 resolution "was generally known among renters of peach orchards." The court also found that many important benefits accrued to the association by reason of these renter member contracts. Those benefits have been commented on in the prior decisions and need not be repeated here. All of the findings above discussed find ample support in the record.

The court found that after 1928 Williams did not own any peach orchards, and that all of his outstanding owner contracts were terminated in that year. The court then made specific findings as to each of the many ranches rented by Williams during 1929 to 1934 and signed up by him with the association. With the exception of the Empire ranch, these many ranches and contracts do not require separate consideration. They are all controlled by substantially the same facts and the same principles of law. The Empire ranch, for reasons hereafter appearing, requires separate consideration.

[2] First as to the ranches other than the Empire: As to each of them the trial court found that Williams rented them from their owners; that he then entered into renter member contracts with the association as to each ranch, substantially in the manner fully described in the Williams Case, supra; that as to each of said contracts, except as limited in the findings, they "have been fully executed, settled and discharged"; that in the operation of said ranches "defendant A. D. Poggetto was a co-partner with the defendant E. R. Williams." Respondents denied the existence of the partnership, and claimed that Williams rented the ranches from Poggetto, but the trial court on substantial and conflicting testimony found against them on this contention. Respondents, of course, on appellant's appeal cannot question the correctness of this finding.

[3,4] As to each of the contracts dealing with these ranches appellant urges that the only legal contract between the parties was a regular marketing agreement; that the renter member arrangement was entirely oral; that to show the existence of such oral contract violates the parol evidence rule; and that respondents have therefore been overpaid in excess of the amount called for by the written contracts.

This identical contention as to substantially similar facts has been fully discussed in the Williams Case, supra. Everything that was said in that case is equally applicable here. Not only did the admission of the oral testimony not violate the parol evidence rule for the reasons pointed out in the Williams Case, but as also pointed out in that case, even if the renter member arrangements were entirely oral, inasmuch as such arrangements have been fully performed, the written contracts must be deemed to have been modified by the execution of the oral contracts.

Appellant also urges that the resolution of 1924 was ultra vires, and that all contracts entered into pursuant thereto must be held to be void and illegal. This contention has been discussed at length and disposed of adversely to appellant's contention in the Harkey, California Canning Peach Growers v. Harkey, Cal.Sup., 78 P.2d 1137, Stafford, Stafford v. California Canning Peach Growers, Cal.Sup., 78 P.2d 1150, and Williams Cases, decided this day. On the authority of those cases, and for the reasons therein stated, the point is held to be without merit.

[5] Appellant also urges that in view of the fact that Williams was a director and former officer of the company, and that his partner Poggetto was general manager of the company, even if renter member contracts entered into by the association with third parties could not be successfully challenged by it, such contracts entered into with its officers and directors can be so challenged. Substantially the same point was involved in the Williams Case, supra, and decided adversely to appellant. The same reasoning is here applicable. The transactions now under discussion were not special transactions, but were normal ordinary transactions entered into pursuant to a formal resolution of the board of directors. Similar transactions were entered into with many other renters to the benefit of all concerned. Williams and Poggetto were under no legal or moral obligation to sell the fruit from these rented orchards to the association. They had complete freedom of choice, and were as free as any other renter to bargain with the association as to these orchards. There is no evidence that either Williams or Poggetto abused their position of trust in consummating the contracts now under discussion. As to these contracts it is our holding that they were renter member contracts within the meaning of the 1924 resolution, and that respondents were properly paid as therein provided.

[6] An entirely different situation exists as to the Empire ranch. This ranch was purchased by Poggetto in 1929, and from that date until May of 1935 he owned this ranch. As to the year 1929, the court below made no finding as to whether Poggetto and Williams were partners in the operation of this ranch, but simply found that in that

year Williams operated the ranch for Poggetto under an agreement to split the gross profits equally, Williams to bear the expenses. For the years 1930, 1931, 1933, and 1934 the court expressly found that as to the operation of this ranch "A. D. Poggetto was a co-partner with the defendant E. R. Williams." The reason for the failure to make a similar finding as to the year 1929 does not clearly appear, although there is some evidence of a different arrangement between the two defendants as to this year than existed in the later years. As to the years 1930, 1931, 1933, and 1934 the finding is amply supported. As to these four years, therefore, Poggetto was the owner of the Empire ranch and Williams was his partner. Under the provisions of the resolution of January 15, 1924, the privileges therein granted were restricted to renters of orchards. Owners of ranches not renting their orchards were not qualified to come under the resolution. Owners were admissible to the association only under a regular marketing agreement. This Poggetto, as general manager, and Williams, as director, well knew. To permit them, as owners, to use their confidential position with the association to secure the benefits of the 1924 resolution open only to renters and not open to owners would be to countenance a fraud upon the owner members of the association. The cases cited by appellant—California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679; California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572; California Canning Peach Growers v. Bardell & Oregoni, 132 Cal.App. 153, 22 P.2d 764—holding that, as to owner members all must stand upon an equal basis are directly in point on this phase of the case. Those cases clearly establish that as to owner members the interests of every member rest upon the same foundation, and no such member can secure an advantage to the injury of any other member. Clearly Poggetto and Williams were not entitled to the renter member price for the Empire peaches in the years 1930, 1931, 1933, and 1934. Having elected to deliver the fruit from the Empire ranch—an owned orchard—to the association they must be held to the same price received by other owner members. The error in allowing respondents renter member price for their Empire peaches for these years materially affected the judgment. This is made clear by a consideration of other findings.

[7, 8] The trial court found that in 1927 Williams as owner operated the Sunnydale ranch under a regular marketing agreement; that the association (deducting certain credits) overpaid Williams for the peaches delivered from this ranch in that year the sum of $5,268.55; that Poggetto was not interested in the operations of this ranch; that the above-mentioned sum was written off the books of the company as a bad debt (apparently by mistake); that Williams has never repaid the sum thus owing to the association. Although the court found that Williams owed this sum to the association, it also found that this debt was offset by various sums found owing to Williams by the association. One of the claims found to partially offset Williams' debt to the association was the sum of $223.39, that the association owed to Williams under his 1927 contract covering the El Camino ranch, and has not paid. Poggetto had no interest in this ranch. This is a proper credit against the debt owed by Williams to the association, and appellant so concedes. The court also found that in the year 1930 when Williams and Poggetto were operating the Merci ranch as partners the association improperly deducted from the purchase price of the peaches the sum of $1,089.48, which sum was in fact due from one Ross Dennison. The court found that neither Poggetto nor Williams had any interest in Dennison's operations. This finding is challenged by appellant, but finds ample support in the record. It is clear therefore that the allowance of this sum was also a proper offset against Williams' debt to the association. The balance of the offsets allowed by the trial court were in connection with the Empire ranch operations. The court found that in 1930 Williams had been paid $1,314.-25 less than was due him for peaches from this ranch; that in 1931 he was underpaid $2,456.50; and in 1934 in the sum of $467.50. These sums were all held to be proper credits against the sum owing to the association by Williams. The amounts are predicated on the theory that for those years Williams was entitled to be paid as a renter member, while as a matter of fact he was paid as an owner member. Inasmuch as we have already held that as to this ranch he and Poggetto are not entitled to the renter member preference, it follows that the above sums, representing such preference, are not in fact owing by the association, and should not have been allowed as an offset.

[9] For the year 1933, as to the Empire ranch, the court found that Williams had been paid as a renter member. In the

amount the renter member price exceeds the owner member price, in accordance with the views aleady expressed, this constituted an overpayment. Williams and Poggetto should be required to repay to the association such overpayment received by them.

[10] For the year 1929, as to the Empire ranch, the court found that Williams had been paid as a renter member; but, as already indicated, did not find whether or not Williams was a partner of the owner Poggetto in this year. On the retrial if it should develop that they were partners for that year, they should be required to repay the overpayment.

[11] Another credit allowed by the trial court was in the sum of $533.81 for freestone peaches found to have been delivered by Williams to the association in 1933 and for which he has not been paid. The evidence in reference to this item is highly unsatisfactory. In view of the necessity for a retrial in reference to other issues, this issue should also be retried.

Appellant objects to the finding that the indebtedness of $5,268.55 above mentioned was owed solely by Williams, and not also by Poggetto. That finding is amply supported by the record.

[12] The appellant also objects to the findings and conclusions that deny it the right to liquidated damages for respondents' failure to deliver to the association from the Empire ranch for the season of 1935. The court found that this ranch was sold by Poggetto to Mrs. Williams in May of 1935, and that thereupon the contract between Mr. Williams and the association was terminated in accordance with the terms of the contract. The judgment in favor of Mrs. Williams, as already pointed out, has become final.

[13] Appellant urges that the sale to Mrs. Williams was not bona fide. The evidence demonstrates that Mrs. Williams purchased the ranch in 1935 with borrowed money and that Mr. Williams did not contribute one cent towards its purchase. The evidence supports the trial court's findings on this issue. It should also be pointed out that the evidence shows that the association accepted the cancellation of this contract.

[14] In addition to the main item of $5,268.55 found to be owing from Williams to the association, above discussed, the trial court also found that Williams owed some small sums for fertilizer purchased by him. These items, as well as the amount of the judgment in the Williams Case, supra, should be taken into consideration on the new trial in arriving at a proper accounting.

From what has been said it is obvious that a new trial must be had as to some of the issues involved herein. No necessity exists for the retrying of any issue held in this opinion to have been properly decided. Those issues decided upon conflicting evidence, which evidence has been held herein sufficient to support the findings, should not be retried. A new accounting must be had in order to determine the proper amount owing by Williams, particularly because of his operation of the Empire ranch, and to determine the proper amount of the offsets that should be allowed him. The status of the Empire ranch for the year 1929 must be determined. The validity of Williams' claim for an allowance for freestone peaches in 1933 must be passed upon. It must be determined what debts are owing solely by Williams, and those that are owing by Williams and Poggetto as partners, and also what credits are properly allowable to Williams and what ones are allowable to the partnership.

For the foregoing reasons the judgment appealed from is reversed, with instructions to the trial court to proceed as herein indicated. Each side to bear their own costs on this appeal.

Justices HOUSER and LANGDON, deeming themselves disqualified, do not participate herein.

26 Cal.App.2d 143

HARWELL v. HARWELL.

Civ. 2209.

District Court of Appeal, Fourth District, California.

April 26, 1938.

Hearing Denied by Supreme Court June 24, 1938.

1. Divorce ⚷238

The portion of an interlocutory decree attempting to award wife guilty of desertion support money was void.

2. Divorce ⚷152

An interlocutory decree granting husband a divorce on account of wife's desertion and allowing wife permanent support money was valid as to the portion affecting the marital status and portion awarding support money was void on its face, and had no effect upon valid portion of decree.

3. Divorce ⚷152

A wife could not attack a decree granting husband divorce on ground of wife's desertion, notwithstanding that portion of decree allowing wife support money was void on its face, since the void portion of decree did not affect valid portion affecting their marital status.

Appeal from Superior Court, Fresno County; Frank Lamberson, Judge.

Action by Frances A. Harwell against Randle C. Harwell to set aside and vacate an interlocutory decree which gave her husband, Randle C. Harwell, a divorce on ground of desertion and awarded her permanent support in sum of $60 per month. Judgment for defendant, and plaintiff appeals.

Affirmed.

William E. Prather, of Los Angeles, for appellant.

Martin C. Thuesen, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered after a demurrer to plaintiff's second amended complaint had been sustained without leave to amend.

Plaintiff brought this action to set aside and vacate an interlocutory decree which gave her husband, Randle C. Harwell, a divorce on the ground of desertion and awarded her permanent support in the sum of $60 per month. The sole ground for setting aside the interlocutory decree, attempted to be stated in the second amended complaint, is mistake of law on the part of her attorney and of the trial judge who presided over the trial of the divorce action in granting alimony to a wife when her husband had been given an interlocutory decree of divorce because of desertion on her part. It is not suggested that there was any lack of jurisdiction of the divorce court or that the evidence failed to support the findings as to the desertion by the wife. There is no intimation of fraud or mistake on this phase of the case.

[1] It is admitted that an innocent husband, who is given a divorce from a guilty wife because of her desertion, cannot be compelled to pay her permanent support money after the divorce. If the interlocutory decree attempts to award the guilty wife support money, that portion of it is void. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902; Johnson v. Superior Court, 128 Cal.App. 584, 17 P.2d 1055; Schluter v. Schluter, 130 Cal.App. 780, 20 P.2d 723; Gaudio v. Gaudio, 138 Cal.App. 289, 32 P.2d 156.

[2] It must be admitted that the portion of the interlocutory decree affecting the marital status of the parties is valid and binding and that the portion of the decree awarding support money to the wife is void on its face.

[3] In Corbett v. Corbett, 113 Cal.App. 595, 298 P. 819, 822, an action involving the validity of a divorce decree, it is said:

"It is true that a judgment of divorce which is not void on its face may not be impeached collaterally. 9 Cal.Jur. 750, § 103. But a judgment which is void on its face is a mere nullity, and may be collaterally attacked. In 1 Freeman on Judgments, p. 643, § 322, it is said: 'A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification.'

"So, also, a judgment which appears upon its face to be partially void may be challenged collaterally with respect to the void provision when it can be readily severed from the valid portion thereof. In 1 Freeman on Judgments, at page 648, § 324, it is said: 'With respect to the relief granted a judgment is likewise divisible.

It may be good in part and bad in part. As to some of the relief it may be wholly worthless and at the same time be free from invalidating faults as to other matters adjudicated. If the void portion of the judgment does not infect the whole with invalidity and may be separated from the remainder and treated as surplusage, the judgment will not be avoided, in toto, but will be upheld as to that portion which was within the jurisdiction and power of the court to render.'"

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

26 Cal.App.2d 126

McLEAN et al. v. TUCKER et al.

Civ. 6035.

District Court of Appeal, Third District, California.

April 26, 1938.

1. Corporations 🔑679

A Nevada statute prohibiting insolvent corporation from preferring its creditors was not controlling as to effect of execution by Nevada corporation of deed of California mining claims to creditor holding California judgment against corporation for indebtedness incurred in California, and as to effect of delivery of deed in escrow in California to be delivered over to successful party on appeal from judgment, but effect of transaction was governed by California laws. St.Nev.1925, c. 177, § 45.

2. Corporations 🔑638

A foreign corporation doing business in California is subject to California laws as to such business, and, unless charter provisions of the corporation contain limiting clauses, general statutes of state where corporation is organized do not control.

3. Courts 🔑8

State laws authorizing or forbidding preferences have no extraterritorial force, but are intended to operate only with respect to property subject to control of courts of state where laws are in force.

4. Corporations 🔑679

An agreement, which was regularly executed by officers of Nevada corporation and by creditor holding California judgment against corporation for indebtedness incurred in California, and which required corporation to deliver deed of California mining claims in escrow, required escrow holder to deliver deed to successful party on appeal from judgment, required creditor to desist from making sale of claims under judgment, and authorized corporation to find purchaser of claims, was valid, and, on affirmance of judgment, creditor was entitled to deed.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, J.

Action by W. J. McLean and others against W. W. Tucker for a declaratory judgment as to the legal effect of the execution of a certain deed and its delivery in escrow in California by a Nevada corporation, wherein defendant filed a cross-complaint, and wherein Marion P. Betty intervened. From an adverse judgment, plaintiffs appeal.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellants.

Gerard Remington, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was prosecuted in the trial court for the purpose of obtaining a declaratory judgment under the provisions of section 1060 of the Code of Civil Procedure, and for the purpose of having construed the legal effect of the execution of a certain deed and its delivery in escrow in California by a Nevada corporation.

A second cause of action is set forth in the complaint alleging the invalidity of the deed under section 45 of the Nevada Domestic Corporation Act of 1925, St.Nev. 1925, c. 177.

The plaintiffs in the action are stockholders and officers of a certain mining corporation organized under the laws of the state of Nevada in the year 1926, known as and called the "Cave Springs Mining Corporation." Thereafter, said mining corporation continued transacting business in the state of California until about October 5, 1932. Some of the plaintiffs are creditors of the corporation. The corporation, while doing business in the state of California, never qualified under the laws of the state of California to do business therein.

During the time that the corporation was carrying on mining operations in the state of California it became indebted to the defendant in a sum between $5,000 and $6,000. On or about June 30, 1931, the defendant obtained a judgment against the corporation in the courts of the state of California. The property of the corporation is situate in the county of San Bernardino, and consists of certain patented mining claims and certain mining claims, unpatented.

After obtaining the judgment just mentioned, the plaintiff had an execution issued thereon, and was about to levy the execution upon the mining claims just referred to; in order to stay execution upon the property of the corporation a deed was executed by the corporation to the respondent in this action, conveying the mining premises belonging to the corporation to the defendant. This deed was placed in escrow. An agreement was entered into between the corporation and the defendant, relative to placing said deed in escrow, with directions to deliver the deed to the defendant in the event that the judgment in favor of the defendant was affirmed on appeal, and that during the time elapsing before said appeal should be determined, the defendant would not have any execution levied upon the mining claims belonging to the corporation. It was further agreed that if the judgment which the defendant had obtained against the corporation should be affirmed on appeal, then and in that event the deed placed in escrow should be delivered to the defendant, conveying to him the title to the mining premises heretofore referred to.

The deed and the agreement appear to have been executed in pursuance of a resolution regularly adopted by the officers of the corporation. The agreement in question is in the following words and figures:

"It is hereby agreed between W. W. Tucker and Cave Springs Mining Corporation, a corporation, in consideration of their mutual agreements herein contained,

"1. That by mutual consent of all parties, Action No. W-111-J, entitled H. Kimber, plaintiff, v. Cave Springs Mining Corporation, W. W. Tucker, defendants, pending in the United States District Court, Southern District of California, Central Division, has been dismissed without prejudice.

"2. That there has been deposited with Marion P. Betty, of 215 W. Fifth St., Los Angeles, California, in escrow, a certain deed executed by Cave Springs Mining Corporation, a Corporation, to W. W. Tucker, covering certain mining property in San Bernardino County, State of California, on the following conditions: That in event a certain appeal case now pending as the 2nd Civil No. 8275, in the District Court of Appeal, 2nd Appellate District, State of California, entitled, W. W. Tucker, plaintiff and respondent, v. Cave Springs Mining Corporation, a Corporation, defendant and appellant [139 Cal.App. 213, 33 P.2d 871], shall be dismissed or finally terminated in favor of the said plaintiff, then said deed shall be delivered to said W. W. Tucker; that if said appeal shall be terminated in favor of defendant, then said deed shall be returned to said Cave Springs Mining Corporation.

"3. That the said W. W. Tucker will, and by these presents does agree to place in escrow along with the said deed and this contract, a release of the execution issued out of the Superior Court of the County of Los Angeles, State of California, in the case of W. W. Tucker v. Cave Springs Mining Corporation, No. 303-625, to abide the determination of the appeal prosecuted by the defendant in said cause; and the said W. W. Tucker agrees that pending the said appeal that he will not cause to be levied any further executions under and by virtue of said judgment if, in the event the said appeal so prosecuted by the defendant in the above entitled cause be determined in favor of the plaintiff, then in that event the said W. W. Tucker shall have returned to him the said release from execution of the said property, but if the said appeal shall be determined in favor of the appellants, said release of execution shall be delivered to the said defendant corporation.

"4. It is further understood and agreed that in the event that any time pending the terms of this escrow, to-wit, the final determination on appeal of the above cause, that there shall be a sale for the property involved in the said action, and by the terms of the said sale, cash shall be deposited, it is the understanding of the parties hereto that the said W. W. Tucker will accept in lieu of all of the rights herein mentioned in his favor, the full amount of his judgment, whereupon the said W. W. Tucker shall issue full satisfaction of his said judgment, and all papers deposited herein shall be delivered to the said Cave Springs Mining Corporation without any further right thereto or claims against the said Corporation, except the rights of the said W. W. Tucker to participate as a stockholder therein."

This agreement was signed on the 15th day of July, 1932, and acknowledged on September 1, 1932 (signatures and acknowledgment omitted herein). The deed in question appears to be simply an ordinary grant, bargain, and sale deed conveying the different mining claims to the defendant in this action.

To the complaint filed in this action the defendant first filed an answer, and also a cross-complaint, alleging the purposes for which the deed was executed, to wit: In effect, to secure a stay of execution pending the determination of the appeal in question, it being provided that if the appeal were decided in favor of the defendant, the plaintiff in that action, then and in that case the deed conveying title should be delivered to him according to the terms of the escrow agreement, and praying the court for delivery of the deed and the quieting of his title thereto. The defendant had judgment and the plaintiffs appeal.

While the judgment does not specifically set forth the rights of the parties as a declaratory judgment, under the provisions of section 1060, supra, it does in effect determine the legal rights of all of the parties thereto by decreeing that the deed should be delivered to the defendant, and his title to the premises quieted, as such decree excludes any right or title of the corporation to the premises, and also any right or title of the plaintiffs in this action to any portion of the mining properties conveyed by the deed to the respondent in this action.

The chief contention on the part of the appellants is that the deed of conveyance was and is void under the provisions of section 45 of the Nevada Domestic Corporation Act of 1925. That section of the act is as follows:

"No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid. Every person receiving by means of such prohibited act or deed any property of a corporation shall be bound to account therefor to its creditors or stockholders. No holder of stock of any corporation not fully paid shall make any transfer thereof to any person in contemplation of the corporation's insolvency. Every transfer or assignment or other act done in violation of the foregoing provision of this section shall be void. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provision of this section shall be personally liable to the creditors and stockholders of the corporation of which he shall be a director or an officer to the full extent of any loss they may respectively sustain by such violation."

[1, 2] It is contended on the part of the appellants that the section to which we have referred, being a part of the general corporation laws of the state of Nevada, became a part of, and entered into the charter incorporating the Cave Mining Corporation, and that the provisions of said act are and were binding upon the corporation doing business in the state of California. This contention, however, does not appear to be well taken. While there appears to be some confusion in the language of textwriters as to what constitutes the charter of a corporation, it seems to be pretty well settled that a foreign corporation doing business in the state of California is subject to the laws of the state of California as to the business therein transacted, and unless the charter provisions of the corporation contain limiting clauses, general statutes of the state where the corporation is organized do not control.

Respondent first calls our attention to section 345 of the Civil Code, to the effect that the execution of the escrow agreement and deed is not an ultra vires act as between the corporation and the defendant. It may be here stated that the sufficiency of the consideration is not raised by the pleadings, but is in some measure attempted to be raised by the testimony, to the effect that the property in question was much more valuable than the sum of $5,000, or whatever might be the total judgment obtained by the defendant, including his costs. This testimony we have read, and while the court made no finding thereon, it is not of such a character as would support a finding fixing the value of the property at any sum whatever. The testimony is simply speculative, apparently based upon a tentative contract for the sale of property, which common knowledge teaches us is dependent upon the value of the property as shown by future development. The mine itself had stood idle for a number of years.

The agreement which we have set forth gave the appellants in this action many months of time within which to find a purchaser. We may also here state that no cash offer was ever in fact made by the appellants, by the corporation, or by anyone in behalf of the appellants, or in behalf of the corporation, to the defendant, as provided in the agreement. The testimony of the witness as to the cash offer was to the effect that he had $500 in the bank and that payment was to be strung along as it might be secured from the intending purchaser. This is not fully explained in the testimony, but there is sufficient there to show that the so-called cash offer was wholly without merit or legal effect.

The judgment in the case referred to was finally affirmed upon appeal, and thereupon the plaintiffs in this action notified the escrowholder not to deliver the deed to which we have referred. The escrowholder filed a petition in intervention for the purpose of having the court determine whether or not he should or should not deliver the deed according to the escrow agreement.

In section 8550, Fletcher's Cyc. on Corporations, we find the following: "But where there is nothing in the charter of the foreign corporation, or in the laws of the state where it is doing business, prohibiting it from so doing, it may execute an assignment or a mortgage giving a preference to one or more creditors. Since insolvency laws have as a general rule no extraterritorial operation, a foreign insolvent corporation may make a valid assignment with a preference to creditors in the state where it is doing business, if the laws of such state permit, although such preferential assignments would be invalid under the laws of the corporation's domicile."

[3] That the laws of California govern in the instant case we may cite 14A C.J. p. 919, § 3099, as follows: "State laws authorizing or forbidding preferences have no extraterritorial force, but are intended to operate only with respect to property subject to the control of the courts of the State where the laws are in force. And in accordance with the view that the laws of a State forbidding preferences are not binding upon the courts of other States, and do not affect the rights of the creditors of an insolvent corporation to secure and collect their claims by any and all methods known to the laws of that State, a corporation organized under the laws of a State which forbids preferences by insolvent corporations, but which is doing business solely in another State, where all its property is located, and the laws of which State permit such preferences, may prefer bona fide creditors who are nonresidents of the State where the corporation was organized by executing judgment notes to them and suffering judgment to be taken thereon in the courts of the State where the corporation is doing business. And it has similarly been held that an insolvent corporation organized under the laws of a State which permits preferences by insolvent corporations and doing business in another State where its property is situated and the laws of which also permit preferences may execute a valid judgment note in another State whose laws prohibit preferences to a resident thereof, who is a bona fide creditor with the intent that judgment thereon shall be taken in the State where the property of the Corporation is situated, with intent that such property shall be appropriated to its payment; and where a Corporation is not prohibited by its charter from making a preference of creditors, the enactment of a statute in the state where it was incorporated forbidding preferences, does not prevent it from preferring creditors in another state by confession of judgment where that method of preference is permitted. A mortgage by an insolvent corporation covering property in a State other than that in which it was created for the purpose of preferring creditors is not enforceable if the laws of that State forbid preferences, although the laws of the state in which the corporation

was created do not. Conversely, the fact that the transfers of property in violation of the laws of the forum were made in another state does not render the act less fraudulent in law."

This statement of the law is supported by the opinion in the case of Gillis v. Pan American Western Petroleum Co., 3 Cal. 2d 249, 44 P.2d 311.

In section 8318, Fletcher's Cyc. Corporation, the rule relative to a corporation doing business in the state other than that in which it is formed is stated as follows: "It is held that it is the charter alone which by the law of comity is recognized and enforced in other jurisdictions, and not the general legislative or judicial decisions of the State in which the corporation is formed. Regulations or decisions of a sister-state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions."

To the same effect is the case of Vanderpoel v. Gorman, 140 N.Y. 563, 35 N.E. 932, 24 L.R.A. 548, 37 Am.St.Rep. 601, where we find the following: "The question of the validity of an attempted transfer of title to an assignee for creditors by a corporation organized in one state and doing business in another, is for the state in which the property is situated. * * * Property of a domestic corporation situated outside of the state would not be subject to our jurisdiction."

In the instant case the court, among other things, found as follows: "That there was no proof or claim that said deed or agreement were made with intent to hinder, delay or defraud the creditors of the corporation."

The court further found that Tucker had performed and complied with all the terms of the agreement, and also that no damage or loss had been suffered by the corporation by reason of any act of the defendant Tucker. The court also found the purposes for which the agreement and deed were executed, to wit: To stay execution upon the judgment lien which had been obtained by the said W. W. Tucker.

[4] It further appears from the record that the purpose of securing the stay of execution was to enable the corporation, if possible, to make sale of the property, and that the defendant Tucker desisted from making sale of the property, as evidenced by the agreement, as he otherwise might have done under his judgment lien, and obtain title to the property under execution sale in the event that no one offered a higher price therefor than he, Tucker, was willing to pay. In other words, Tucker had a judgment lien upon the property and had the means within his hands to subject the property to the satisfaction of his judgment, and the agreement entered into was simply another form of making payment by the corporation and securing payment by Tucker of his judgment. The court further found that the agreement and deed were executed for a good and valuable consideration.

Other questions have been presented for our consideration, but from what we have said, and the authorities cited, we conclude that the judgment should be and it is hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

26 Cal.App.2d 145

PEOPLE v. HAMMOND.

Cr. 510.

District Court of Appeal, Fourth District, California.

April 26, 1938.

Hearing Denied by Supreme Court May 26, 1938.

1. Criminal law ⚷996(2)

Where defendant entered a plea of guilty to information charging murder and trial court sentenced defendant to life imprisonment without fixing degree of the crime, fact that judgment had been pronounced and more than 20 years had elapsed since defendant entered plea of guilty did not preclude trial court from fixing the degree of the offense. Pen.Code, § 1191, as amended by St.1937, p. 1499.

2. Criminal law ⚷996(2)

Where defendant entered plea of guilty to information charging murder and trial court sentenced defendant to life imprisonment without fixing degree of the offense, and where, after more than 20 years had elapsed after defendant entered his plea of guilty, defendant was brought before trial court which fixed degree of crime and pronounced a second judgment upon defendant, even if trial court exceeded its jurisdiction in doing anything more than fixing degree of the crime, the defendant could be confined under the original judgment following the fixing of the degree of the offense.

3. Criminal law ⟹538(3)

Where corpus delicti is established, a defendant may be convicted on his own confession.

4. Criminal law ⟹410

A defendant is bound by admission of his counsel made in open court.

5. Criminal law ⟹980(2)

Where defendant entered plea of guilty to information charging murder and court sentenced defendant to life imprisonment without fixing degree of crime, and where admissions of defendant and his counsel in open court at time original judgment was entered established every necessary element of murder in first degree, and transcript of such evidence was produced at hearing held for purpose of fixing degree of the offense, evidence sustained order fixing the degree of the crime as murder in the first degree. Pen.Code, § 1192.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

C. L. Hammond entered a plea of guilty to an information charging murder, and from an order fixing the degree of the crime of which defendant stood convicted, and from a judgment pronounced upon him, he appeals.

Affirmed.

C. L. Hammond, in pro. per.

U. S. Webb, Atty. Gen., and Dan F. Conway, Dist. Atty., and Henry A. Hunter, Deputy Dist. Atty., both of Fresno, for the People.

MARKS, Justice.

This is an appeal from an order of the superior court of Fresno county fixing the degree of the crime of which defendant stood convicted on a plea of guilty and from a judgment pronounced upon him.

On June 7, 1917, defendant and his wife, Anna Hammond, each entered a plea of guilty to an information charging murder. The trial court did not fix the degree of the crime, but sentenced Hammond to imprisonment for life in the state penitentiary at Folsom. In December, 1937, Hammond sought his release from imprisonment by means of a writ of habeas corpus. In that proceeding the appellate court made the following order: "The writ is discharged and the prisoner is remanded, with direction to the warden of Folsom state prison to deliver the petitioner into the custody of the sheriff of Fresno county at a time to be fixed by the superior court of that county, without unnecessary delay, for the purpose of allowing the department of said court having charge of criminal cases to ascertain and fix a degree of the offense of which the defendant has pleaded guilty, and thereupon pronouncing such sentence upon the petitioner as may appear to said court to be just and proper, and order the return of the petitioner to the warden of the Folsom state prison, to be there held in execution of the judgment that may be so pronounced upon the petitioner." Ex parte Hammond, 74 P.2d 308, 310.

In reaching that conclusion it was held that the failure of the trial court to find the degree of the crime did not render the first judgment void, but merely defective.

Defendant maintains that the procedure directed in the habeas corpus proceeding by the District Court of Appeal, and followed by the superior court, was contrary to law and void because the superior court had lost jurisdiction, judgment having been once pronounced and more than 20 years having elapsed since his plea of guilty was entered. Section 1191, Pen.Code, as amended by St.1937, p. 1499.

[1] This precise question has been before the courts of California and it has been decided that the contention so made is unsound. In re Stroff, 132 Cal.App. 351, 22 P.2d 770. A similar though not identical question to the one presented here, and decided in the Stroff Case, was before the Supreme Court in In re Lee, 177 Cal. 690, 171 P. 958, and a like conclusion reached. See, also, People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585; People v. Stratton, 133 Cal.App. 309, 24 P.2d 174.

[2] Defendant next contends that the superior court lacked jurisdiction to fix the degree of the crime and pronounce a second judgment upon him. This argument contains its own answer. If it be conceded, for the sake of argument, that the District Court of Appeal went too far in ordering defendant into the superior court for resentence, and should have confined its order to directing that court to fix the degree of the crime, and it be also con-

ceded that the superior court exceeded its jurisdiction in doing anything more than fix the degree of the crime, then it must also be conceded that the portion of the second judgment which did anything more than fix the degree of the crime was a nullity and may be disregarded. The degree of the crime having been fixed defendant could be confined under the judgment of June 7, 1917. However, the order of the Supreme Court in In re Lee, supra, would indicate approval of the order made by the District Court of Appeal and the procedure followed by the superior court in the instant case.

It is next urged that it is the statutory duty of the trial court to fix the degree of the crime after a plea of guilty is entered, section 1192, Pen.Code, and that in doing so evidence must be taken so that the trial court may have facts before it upon which to base its order; that in the instant case the trial court had no competent evidence before it upon which to determine the degree of the crime. People v. Paraskevopolis, supra.

The record shows that when defendant was returned to court to have the degree of the crime fixed the district attorney offered in evidence a transcript of the reporter's notes taken at the time of the first sentence. The reporter testified that the transcription was true and correct. Objection was made to the introduction of this evidence but not on the ground that a transcription was offered and the original stenographic notes were not produced and read. That question was not raised and is not argued here. It is merely urged that the transcript contained no evidence upon which the trial court could fix the degree of the crime.

We have examined the record of the proceedings which preceded the pronouncement of judgment of June 7, 1917, and may briefly summarize them as follows:

Defendant withdrew his plea of not guilty and entered a plea of guilty. The then counsel for defendant made the following statement: "Mr. Brickley: I would merely suggest that it was understood, I believe, between myself and Mr. McCormick that someone should make a statement of the facts, and I am willing at this time, if the Court so desires, that Mr. McCormick make a statement of the facts involved in this offense, facts immediately preceding and succeeding facts that may be relevant, immediately following."

Mr. McCormick, the then district attorney, proceeded to make a detailed statement of facts showing defendant and his wife guilty of an atrocious, cold-blooded, premeditated, and deliberately planned murder in the first degree for the purpose of financial gain. Among many other things it was stated that deceased's throat had been cut with a razor and his head almost severed from his body.

When the district attorney had concluded the trial judge asked defendant if he had anything to say. Defendant made a statement, and while attempting to throw the primary blame of planning the murder on his wife, freely admitted his own guilt. Among other things, he said: "The Defendant: Well, I might state, Judge, that these answers and questions are quite true except in places changed a little if I understood, and the instance where the razor was used; I was not standing near the box. Mrs. Hammond asked what might be done to quench this noise. I told her I didn't know. He kept a shaving apparatus on this box in the corner. She said, 'Here is his razor, use that.' In that moment, being excited and scared, why I took it from her hand and used it. And the statement that Mr. Lassere raised from the table. She hit this man several times before I made any attempt, but the man seemed to come to himself and try to grapple with the woman, and I stepped away, thinking that he might harm both of us."

Defendant's then counsel made a statement in court in which the following appears: "I think all the facts show, the facts as nearly as they can be ascertained show that she not only planned but practically executed the crime itself. He, however, was fully aware in advance of everything that she intended to do, and if not by an overt act, at least by silent acquiescence he participated in it from a legal standpoint anyhow to the same degree and to the same degree of culpability as herself."

[3-5] It should be observed that the trial court at the time of the last hearing had before it a full and detailed statement of the facts of the crime made by the district attorney at the hearing in June, 1917, which statement was made upon the suggestion if not the request of the attorney for defendant. Defendant heard this statement and, except as to minor details, admitted its truth. Here we have as full and

complete a confession made in open court of all the details of murder in the first degree as is possible to be obtained from a guilty defendant. Where the corpus delicti is established a defendant may be convicted on his own confession. Further, defendant's counsel in open court admitted the details of the crime. A defendant is bound by the admission of his counsel made in open court. The admissions of defendant and his counsel in open court on June 7, 1917, established every necessary element of murder in the first degree and when produced at the last hearing furnished ample evidence upon which the trial judge could fix the degree of the crime as murder in the first degree.

The order and judgment are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

26 Cal.App.2d 114

BROOKS et ux. v. FIDELITY SAVINGS & LOAN ASS'N et al.

Civ. 5996.

District Court of Appeal, Third District, California.

April 25, 1938.

Hearing Denied by Supreme Court June 24, 1938.

1. Specific performance 🔑**49(2)**

Where creditors, under note and trust deed on which $11,118.56 was due, agreed in writing, during general business depression, to discharge debt and release trust deed for $10,000, to be borrowed from the Reconstruction Finance Corporation, and debtors expended time and money in procuring loan, there was sufficient consideration for creditors' agreement to require specific performance thereof. Civ.Code, §§ 1614, 1615.

2. Specific performance 🔑**114(2)**

A complaint, alleging that creditors, under note and trust deed on which $11,118.56 was due, agreed in writing, during general business depression, to discharge debt and release trust deed for $10,000, to be borrowed from the Reconstruction Finance Corporation, and that debtors expended time and money in procuring loan, sufficiently showed that creditors' agreement was supported by consideration to state cause of action for specific performance of agreement. Civ.Code, §§ 1614, 1615.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by George N. Brooks and wife against Fidelity Savings & Loan Association and others for specific performance of a contract. From an adverse judgment and an adverse order, plaintiffs appeal.

Reversed.

Holton & Schuelke, of Whittier, and Paul G. McIver, of Montebello, for appellants.

John L. Mace, of Los Angeles (Arch R. Tuthill, of Los Angeles, of counsel), for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order sustaining the demurrer to the amended complaint and from the order of dismissal and the judgment based thereon.

After alleging the jurisdictional facts it appears from the amended complaint that on or about the 3d day of February, 1928, plaintiffs executed and delivered to defendant Fidelity Savings & Loan Association their promissory note in the sum of $15,000, payable in monthly instalments of $210, which included interest at the rate of 8.4 per cent. per annum. Thereafter the Pacific States Savings & Loan Company became the owner of the note and the deed of trust securing the same. On June 25, 1935, there was a balance due upon the note of $11,118.56.

The amended complaint further alleges that prior to June 25, 1935, plaintiff had been negotiating with defendants for the refinancing of the note and trust deed through the Reconstruction Finance Corporation upon the basis of the payment to the defendants of the sum of $10,000 in full satisfaction of said obligation, it being alleged that as a consideration for the reduction and refinancing of said loan plaintiffs would make an application to the Reconstruction Finance Corporation, and promised that they would pay any and all expenses incidental to the securing of such loan, and do all things that might be required of them by the Reconstruction Finance Corporation in order to secure the loan.

On the 25th day of June, 1935, the defendants accepted plaintiffs' proposition, and agreed in writing that they would, in consideration of said promises on the part of plaintiffs and in consideration of the payment to them of the sum of $10,000, release said trust deed and satisfy and discharge said debt; they knowing at the time of said agreement that the offer of plaintiffs was unequal to the amount due on said note and trust deed. Thereupon, it is alleged, plaintiffs expended large sums for surveying, appraising and insuring the property, and devoted many days of time thereto.

It is then alleged that on the 27th of September, 1935, the Reconstruction Finance Corporation approved a loan to plaintiffs whereby plaintiffs were able to pay defendants the sum of $10,000, and since that date plaintiffs have been ready, able, and willing to pay said $10,000 providing defendants would satisfy the note and reconvey the security, and although informed of such approval by the Reconstruction Finance Corporation, the defendants have refused to perform their part of the agreement.

To this complaint a demurrer was interposed on the ground that said amended complaint did not state a cause of action, and upon the further ground that it did not appear that the agreement sought to be specifically enforced was just, fair and reasonable and supported by adequate consideration. The demurrer was sustained and plaintiffs declining to amend, the court made an order dismissing the amended complaint.

The principal attack upon the complaint is the alleged lack of consideration. Appellant relies upon the presumptive evidence of consideration of a written instrument. Sections 1614, 1615, Civ.Code. In reply respondents contend it is not presumed that a written contract is supported by a consideration if the complaint affirmatively alleges the actual consideration for the contract. In such case they contend the sufficiency of the consideration must be determined by the actual allegations with respect thereto.

Here we have a complaint setting forth the legal effect of various written instruments; the date of maturity does not appear in the complaint, and as far as we can determine from the complaint the note was not due at the date of the agreement.

Section 1614 of the Civil Code declares that a written instrument is presumptive evidence of a consideration, and the following section, 1615, places the burden of showing a want of consideration upon the party seeking to invalidate the same. Respondents cite McCarty v. Beach, 10 Cal. 461, 462, as holding that where a want of consideration for the execution of the instrument is apparent from the averments of the complaint, that fact may be taken advantage of by demurrer. However, it is said in that opinion: "On the hearing, the counsel of respondent confined his argument to two grounds—and which, it may be said, are the only two meriting notice: first, the want of any averment in the complaint of a consideration for the bonds; and, second, the want of any averment of special damage. Neither of these are well taken. The first ground is answered by the fact that the bond, which forms a part of the complaint, is a sealed instrument, to which the law imports a consideration from the seal. At common law, a party was not permitted to plead a want of a consideration as a defence to an action upon a sealed instrument—the presumption of a consideration being absolute and conclusive. (Vrooman v. Phelps, 2 Johns. [N.Y.] 177; Dorr v. Munsell, 13 Johns. [N.Y.] 430.) The statute of this State has modified the rule in this respect so far as to permit the want of consideration to be pleaded. It has not, however, altered the presumption which still accompanies the instrument, but allows it to be rebutted in the answer. Its language is, 'it shall be lawful' for the defendant 'to plead such want of consideration.' It is true, that where a want of consideration for the execution of the instrument is apparent from the averments of the complaint, the fact may be taken advantage of by demurrer, but such is not the present case."

In Cordes v. Harding, 27 Cal.App. 474, 150 P. 650, 653, it is held that where a written instrument is alleged in the complaint the averment as to the character and existence of the consideration is surplusage. The opinion states the situation briefly as follows:

"The plaintiff's complaint, among other things, alleged that the Mines Company was insolvent, and that one of the considerations which induced the defendants to procure their attorney to enter into the agreement was the avowed intention of plaintiff's assignors to throw the Mines Company into bankruptcy, and their forbearance, upon the request of the defendants, to take such action. These allegations were denied generally by the answer of the defendants, and, in response to the supposed issue thus made, the plaintiff offered to prove certain circumstances immediately preceding and attending the execution of the agreement in controversy, viz., the insolvent condition of the Mines Company, and the determination of the plaintiff's assignors to throw it into bankruptcy, from which they were dissuaded by the promise of the defendants, subsequently incorporated into the agreement, to share the respective avails and recoveries of the interested parties. Upon the objection of the defendants that the matters and things included in the offer were irrelevant and immaterial, the offer was rejected and the ruling of the court in that behalf is assigned as prejudicial error.

"The ruling of the trial court was correct. The execution of a written instrument is presumptive evidence of the existence of a consideration (Civ.Code, § 1614), and therefore the averment of the plaintiff's complaint as to the existence and character of the consideration was mere surplusage. The burden of pleading and proving the lack of a consideration sufficient to support a written instrument is upon the party seeking to avoid it upon that ground. (Civ.Code, § 1615.) The answer of the defendants contained nothing more than a naked denial of the existence and character of the particular consideration alleged in the plaintiff's complaint. This was not sufficient to destroy the presumption of a consideration arising from the written execution of the contract, and consequently the existence of a consideration sufficient to support the contract was an admitted fact in the case which rendered the proffered evidence wholly immaterial and irrelevant."

Under the facts pleaded in the complaint, it would appear that the respondents had considerable time to act during which they had the right of election of availing themselves of selling the property, or of accepting the sum of $10,000 in full satisfaction. Weighing all of the conditions then existing—a depressed market for real property, the value of ready cash, the scarcity of bidders at foreclosure sales due to financial conditions which then existed in the general business depression—defendants may have preferred an agreement for the payment of $10,000 in cash rather than to take over the real property on foreclosure.

It is also alleged that plaintiffs expended money and time in procuring the consent of the Reconstruction Finance Corporation to advance the money, something plaintiffs were not called upon to do by the terms of their note.

[1, 2] We believe that sufficient consideration did exist for the execution of the agreement, and on that issue the complaint stated a cause of action.

It is also urged that the complaint did not state a cause of action to specifically enforce the alleged contract because no facts were alleged from which it could be ascertained that the contract was fair, just, and reasonable as to the defendants. We believe, however, that what we have said in regard to the consideration has some bearing upon this item. Also the allegations here found in the complaint are quite similar to the language approved in Ehrhart v. Mahony, 43 Cal.App. 448, 450, 184 P. 1010.

For the foregoing reasons the judgment and order are reversed.

We concur: THOMPSON, J.; PLUMMER, J.

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26 Cal.App.2d 61

BOHN v. BETTER BISCUITS, Inc.*

Civ. 10697.

District Court of Appeal, First District, Division 2, California.

April 20, 1938.

Hearing Denied by Supreme Court June 17, 1938.

1. Corporations 🔑666

A Michigan corporation, which had filed a certified copy of its articles of incorporation with the secretary of state of California and with the county clerk of Alameda county, and had designated an individual at a certain address in Alameda county as its process agent for the state of California, was entitled to be sued in Alameda county for breach of contract, under statute providing for suit in county in which defendants "reside," since "reside" does not mean domicile. Code Civ.Proc. § 16; § 395, as amended by St.1933, p. 1840; Civ.Code, § 3511; §§ 290, 405 et seq., as amended by St.1933, pp. 1360, 1416 et seq.; Const. art. 12, § 16.

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*Hearing denied by Supreme Court 80 P.2d 484.

By approved usage of the language "reside" means: "Live, dwell, abide, sojourn, stay, remain, lodge." In common sense, the word "reside" means: "To abide continuously, to sojourn, to dwell permanently or for a length of time; to be present."

[Ed. Note.—For other definitions of "Reside," see Words & Phrases.]

2. **Corporations** ⚷503(1), 666
Venue ⚷21

The statute providing that the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action, applies to persons both natural and artificial and whether the corporation is a domestic or a foreign corporation, by reason of the enactment of statute providing for the filing by a foreign corporation of a certified copy of its articles of incorporation with the secretary of state, and for the designation of a process agent for the state. Code Civ.Proc. § 395, as amended by St.1933, p. 1840; Civ.Code, § 3511; § 405 et seq., as amended by St.1933, p. 1416 et seq.

3. **Associations** ⚷20(1)
Corporations ⚷503(1, 2)

The word "situated" as used in constitutional provision that a corporation or association may be sued in the county where the contract is made or is to be performed, where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is "situated," at least includes residents. Const. art. 12, § 16.

[Ed. Note.—For other definitions of "Situated," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Ralph M. Bohn against Better Biscuits, Inc., to recover for the alleged breach of a written contract of employment. From an order refusing to change the place of trial, defendant appeals.

Order reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Cleveland R. Wright and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from an order refusing to change the place of trial from the city and county of San Francisco to Alameda county. The plaintiff commenced an action alleging the breach of a written contract of employment. He filed his complaint in the superior court of the state of California, in and for the city and county of San Francisco, caused a summons to be issued and served on the defendant, and the defendant appeared, filed a demurrer, affidavit of merits and of residence, memorandum of authorities, and a notice of a motion to change the place of trial. Later the plaintiff served and filed a reply affidavit and all of said documents were presented by the respective parties at the time the motion for a change of the place of trial was heard. The notice of motion provided and specified, in substance, that the defendant would move the court for an order transferring the cause from the superior court of the state of California, in and for the city and county of San Francisco, to the superior court of the state of California, in and for the county of Alameda, on the ground that the defendant was, at the time of the commencement of the action, and thereafter continued to be, a Michigan corporation, having its main office and principal place of business in Michigan; that the defendant's principal office and principal place of business within the state of California is, and was prior to the commencement of this action, in Emeryville, Alameda county, Cal.; that defendant had no office or place of business, principal or otherwise, in the city and county of San Francisco; that prior to the commencement of the action the defendant duly complied with the provisions of section 405 of the Civil Code of the state of California, as amended by St.1933, p. 1416, filing a certified copy of its articles of incorporation with the secretary of state of the state of California and with the county clerk of the county of Alameda, state of California, and, in addition thereto, that the defendant had filed with said secretary of state the statement referred to in section 405 of the Civil Code of the state of California, as amended, which statement, among other things, designated Ralph M. Bohn, address, corner of Sherwin and Hubbard streets, Emeryville, Alameda county, Cal., as its process agent for the state of California and designated in said statement as the location and address of its principal office within this state, the corner of Sherwin and Hubbard streets, Emeryville, Alameda county, Cal.; that the alleged cause of action is not based upon any contract made or performed, or to be performed, or any obligation or liability arising, or any breach occurring, in the city and county of San Francisco; that the county of Alameda is the proper place of trial.

[1, 2] The defendant contends that under the laws of the state of California a domestic corporation is entitled to have any action against it tried in the county in which it is situated and that under the present statutes a foreign corporation is entitled to the same rights. The plaintiff contends that a foreign corporation resides at its principal place of business, has no residence in the state of California, and therefore that the motion was properly denied. Section 16 of article 12 of the State Constitution is as follows: "A corporation * * * may be sued in the county where * * * the breach [of the contract] occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (Brackets ours.) Section 395 of the Code of Civil Procedure, as amended by St.1933, p. 1840, provides: "In all other cases, * * * the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. * * * If none of the defendants reside in the State, * * * the action may be tried in any county which the plaintiff may designate in his complaint." Neither party claims any statute is invalid, but the parties disagree as to the proper construction of section 395 of the Code of Civil Procedure, as amended, and section 16, article 12, of the Constitution. We will discuss first the provisions of section 395 of the Code of Civil Procedure, as amended. The plaintiff stresses the word "reside." It then contends that as the defendant is a foreign corporation having its principal place of business at Grand Rapids, Mich., that place is its residence and it may not be heard to claim that it resides at any other place. If by the use of the word "reside" one means "domicil" that contention would be sound. But in this state our statutes provide that words are construed according to the context and the approved usage of the language. Code Civ.Proc. § 16. It is not claimed that there is anything in the context showing the word "reside" was intended to mean "domicil." By approved usage of the language "reside" means: "Live, dwell, abide, sojourn, stay, remain, lodge." Those words are synonyms. Webster's New International Dictionary. In common sense, the word "reside" means: "To abide continuously, to sojourn, to dwell permanently or for a length of time; to be present. * * *" 54 C.J. 702. That meaning was applied to this identical statute. Jenkins v. California Stage Co., 22 Cal. 537, 538. In Ballentine's Law Dictionary the author states: "Persons who are said to reside in a place usually include all those who are the actual, stated dwellers there, even though they may have a technical domicil elsewhere." That rule was applied in a case in which the court was asked to take jurisdiction and appoint a guardian. Kelsey v. Green, 69 Conn. 291, 37 A. 679, 38 L.R.A. 471. By a long line of decisions it has been held that a domestic corporation resides at the place where its principal place of business is located. Walker v. Wells Fargo Bank, etc., Co., 8 Cal.2d 447, 65 P.2d 1299. The designation of the principal place of business of a domestic corporation is contained in its articles. Civ.Code, § 290, as amended by St.1933, p. 1360. The designation of the principal place of business of a foreign corporation in this state is contained in the statement which it is required to file in the office of the secretary of state before it may legally transact business in this state. Civ. Code, § 405, as amended by St.1933, p. 1416. Prior to the enactment of sections 405–406a, St.1931, pp. 1830–1832, a foreign corporation had no locus in this state. No statute required it to designate, by a written statement duly filed in the office of the secretary of state, the location of its principal place of business in the state. After the enactment of said sections, the principal place of business of foreign corporations as well as domestic corporations was fixed by law. When the reason is the same, the rule should be the same. Civ. Code, § 3511. It follows under well-settled rules that under a reasonable interpretation of the provisions of section 395 of the Code of Civil Procedure, as amended, it might be held that, by reason of the enactment of section 405 et seq. of the Civil Code, as amended by St.1933, p. 1416 et

seq., said section 395 of the Code of Civil Procedure, as amended, applies to persons both natural and artificial and whether the corporation is a domestic or a foreign corporation. Section 395, Code of Civil Procedure, as amended, does not use the word "corporation," but it has never been held that its provisions did not apply to corporations. No reason appears why they should be so limited. There is no more reason for a state-wide venue when the action is against a corporation than when against a natural person, nor when it is against a foreign corporation than when against a domestic corporation.

[3] The meaning of section 16, article 12, State Constitution, is even less debatable. Whatever may be the provisions of our statutes they are controlled by the provisions of the Constitution. Section 16 is as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The evidence introduced in the instant case having shown that the plaintiff's cause of action was for breach of contract, that the contract was neither made nor to be performed, nor was it breached in San Francisco, the sole question remaining for determination was where was the principal place of business of the defendant corporation situated. By a long line of authorities the word "situated" at least includes residence. In Walker v. Wells Fargo Bank, etc., Co., 8 Cal.2d 447, on page 449, 65 P.2d 1299, it is said: "The language of this constitutional provision that a corporation 'may be sued' in any one of the several designated places has been held to mean not merely that an action may be commenced but that it may be prosecuted to judgment in any one of said several places, unless the corporate defendant can allege and show some sufficient ground for a change of the place of trial other than the mere fact that the principal place of business or 'residence' of the corporation is in another county." However, the section of the Constitution does not use the word "residence," nor does it classify the corporations therein referred to into domestic corporations and foreign corporations. In the case of Cohn v. Central Pacific R. R. Co., 71 Cal. 488, 12 P. 498, the plaintiff sued the defendant in Los Angeles for a breach of contract. The defendant's principal place of business was San Francisco. The contract was made there and it was not to be performed in the county of Los Angeles, nor did the breach occur in Los Angeles county. The decision was by a divided court. But all members of the court were of the opinion that the action was properly transferred to San Francisco. All members of the court based their opinions and relied solely on the language contained in section 16 of article 12. The case of Cook v. Ray Manufacturing Co., 159 Cal. 694, 115 P. 318, was based on an alleged breach of warranty of the quality and fitness of certain material. The defendant was a domestic corporation having its principal place of business in San Francisco. The alleged breach of the contract was in Santa Clara county. Plaintiff commenced its action in the latter county and the defendant moved to change the place of trial. Its motion was denied and on appeal the defendant showed that, if it were a natural person, under the provisions of section 395 of the Code of Civil Procedure, as amended, its motion should have been granted. Thereupon it contended that the provisions of section 16 of article 12 of the Constitution were invalid under the Fourteenth Amendment of the Federal Constitution because the defendant was not accorded the same rights that would have been accorded a natural person. Mr. Chief Justice Beatty, writing the opinion, was at pains to show that section 16 was based on many different facts showing that the classification establishing a different rule as to a corporation from the rule applicable to a natural person was a valid classification, and the order denying the motion to change the venue was affirmed. There is not a word contained in section 16 showing that its provisions are addressed to domestic corporations only and not to foreign corporations. The plaintiff cites no authorities and we are not aware of any holding that a foreign corporation having complied with the provisions of section 405 et seq. of the Civil Code, as amended, is not "situated" in the state of California. However, in effect the plaintiff would contend that section 16 of article 12 should read as though it were written, "A domestic corporation or association, etc." The defendant contends that we may not read the word "domestic" into the provisions of said section. Continuing it asserts that to do so would be to render said section invalid under the provi-

sions of the Fourteenth Amendment to the Constitution of the United States.

The defendant cites and relies on the case entitled Power Manufacturing Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165. In that case the validity of the Statutes of Arkansas (1921) was involved. Section 1152 is as follows: "Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations." Section 1164 applies to real property. Section 1165 applies to actions to recover fines, etc., actions against a public officer, and actions on official bonds. Section 1171 is as follows: "An action, other than those in §§ 1164, 1165 against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides." Section 1176 provides: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned." Section 1826 provides: "Every company or corporation incorporated under the laws of any other State, Territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served." Section 1829 provides: "Service of summons and other process upon the agent designated under the provisions of § 1826 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not." Saunders was a citizen and resident of Ohio. Power Manufacturing Company was a corporation formed under the laws of the state of Ohio. Besides its activities in Ohio it maintained a warehouse at Stuttgart, Ark., where it did a local business. Saunders was injured in that warehouse. The corporation had fully complied with the provisions of section 1826, supra, and in its statutory statement named Stuttgart as its place of business in the state of Arkansas. It did no business and had no office, officer, or agent elsewhere in the state. Stuttgart is in Arkansas county and is its county seat. Saunders commenced an action in Saline county in the state of Arkansas and caused the summons to be served on the designated agent at Stuttgart. In due time the corporation made a motion to dismiss and objected to being sued in Saline county and assailed the validity of the statutes of Arkansas in so far as they permitted a foreign corporation to be sued in a county where it does no business and has no office, officer, or agent, on the ground that they are unreasonably discriminatory and arbitrary and therefore in conflict with the equal protection clause of the Constitution of the United States. The trial court denied the motion and the Supreme Court affirmed the ruling. An appeal was taken to the United States Supreme Court. That court held that the objection of the Power Manufacturing Company to the validity of the venue provisions of the statutes of Arkansas was well taken.

The point was under discussion in Hobson v. Metropolitan Casualty Ins. Co., 114 Cal.App. 349, 300 P. 87. But in that case the defendant did not show that it had complied with the provisions of sections 405-416, inclusive, of the Civil Code. In passing, 114 Cal.App. 349, at page 353, 300 P. 87, the court said: "If the facts were the same in this case, and a sufficient showing were made as to the defendant having complied with the statutes of this state in filing papers with the secretary of state, and in the office of the county clerk of Los Angeles, designating the city and county of Los Angeles as its principal place of business, and designating an agent upon whom service might be made, then we would be constrained to hold that the Saunders Case is controlling here."

The state of Minnesota has statutory provisions similar to but not identical with Civil Code, § 405 et seq. 2 Mason's Minn. St.1927, § 7493 et seq. In State ex rel. Oakland Motor Car Co. v. District Court of Waseca County, 176 Minn. 78, 222 N.W. 524, a motion to change the place of trial was under consideration. Oakland Motor Car Company, a corporation of Michigan, had filed documents with the secretary of state showing its principal place of business in Minnesota to be in Hennepin county, but not in either Blue Earth or Waseca counties. It was sued in the latter county. It moved to change the place of trial. Its motion was denied. It applied for a writ of mandamus. In passing on that application the court said: "No concept of the law of corporations is more common than that of a corporation's presence wherever it has a definitely established agent, office, or other place of business. 7 R.C.L. 695, 696; 14 C.J. 338." It then discussed Power Manufacturing Co. v. Saunders, supra. Having done so, the court said: "So, all else aside, if we are to save section 9215 of our own statute from the possibility of successful attack on the same line, we must not construe it as giving to a resident domestic corporation a voice in fixing the venue of transitory actions against it, while denying the same right to a domesticated foreign corporation in the same situation. The language of the statute does not require any such construction for the determinative phrase, 'defendants residing in different counties,' may well be taken as including corporations, both foreign and domestic, which can be considered as resident in a given county in this state through the location there of an established agent, office, or other place of business. We so construe it." In State ex rel. Twin City & Southern Bus Co. v. District Court of Otter Tail County, 178 Minn. 72, 225 N.W. 915, the point was presented following similar procedure. On page 916 of 225 N.W. the Supreme Court of Minnesota enumerated two of its cases and overruled them, saying: "We are now persuaded that the part of the statute relating to foreign corporations as construed in the cases cited offends the equal protection clause of the Fourteenth Amendment to the federal Constitution, in that it unreasonably discriminates against foreign corporations in favor of domestic, according to Power Manufacturing Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165."

The plaintiff cites and relies on Cincinnati Street Ry. Co. v. Snell, 193 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604. It is not in point. The litigation arose in the state of Ohio. An examination of its statutes discloses that the place for the commencement of an action against a corporation other than an insurance company or a mining company is as follows: "An action * * * against a corporation created under the laws of this state may be brought in the county in which such corporation is situated, or has or had its principal office or place of business or in which such corporation has an office or agent, or in any county in which a summons may be served upon the president, chairman or president, of the board of directors or trustees or other chief officer." Section 5023. "An action * * * against a nonresident of this state or a foreign corporation, may be brought in any county in which there is property of, or debts owing to, the defendant or where such defendant is found, or where the cause of action, or some part thereof arose." Section 5027. "When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties. * * *" Section 5030. At all times the railway company contended that a change of the place of trial was rightly refused because section 5030 did not apply to all persons both natural and artificial. The trial court sustained the contention. The Supreme Court reversed the judgment. Snell v. Street Railway Co., 60 Ohio St. 256, 54 N.E. 270. In deciding the case the Supreme Court said: "It has never been regarded as essential to the validity of remedial procedure that it should be applicable in all of its provisions to all persons or parties, alike." An appeal was taken to the United States Supreme Court. That court quoted the language of the Supreme Court of Ohio and affirmed the latter court. The courts of this state, under the same set of facts, would for the same reasons have declared the same rule. Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73.

Having held that section 5030 of the Revised Statutes of Ohio made a valid and sound classification of the rights of litigants as there classified, the Supreme Court of

Ohio said: "In neither case is any party deprived of the equal protection of the law, for each is assured of a fair trial, with equal opportunities to establish and enforce his rights; nor is the remedy by due course of law denied, because in the forum to which the cause is removed the trial is conducted in the same way, under the same mode of procedure, as in that from which it was changed, with all remedial rights of the parties unimpaired." In Long v. General Petroleum Corporation, 11 Cal.App.2d 708, 54 P.2d 1147, the plaintiff quoted the above passage and contended that a foreign corporation could not complain that it was not accorded the same consideration as a domestic corporation if it was given a trial in a co-ordinate court in the state whereever that court might be located. The language above quoted seems to sustain the contention of this plaintiff. But we are not able to apply that reasoning. It is not sustained by the facts in the Snell Case as we have shown above. It is in conflict with Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 P. 120. On page 474 of 150 Cal., page 123 of 89 P., speaking of the relative rights of individuals and domestic corporations, the court said: "Where the subject-matter of the action, to wit, land, is made the test for fixing the place of trial of the action, no reason or distinction appears, or can be made to appear, why the right should be given to a natural person to have such an action tried in the county where the land is situated, and the same right should be denied to an artificial person, a corporation. In State v. Hayes, 81 Mo. 574, it is held that the provisions in regard to the venue of an action involve rights in respect to which the fourteenth amendment of the Constitution of the United States forbids arbitrary discrimination. That the discrimination is arbitrary and rests upon no logical or rational distinction seems too plain to permit of debate, or to call for elaborate consideration. No conceivable ground can be suggested why a natural person should have the right of trial of an action involving an interest in land in the county where the land is situated, and the same right should be denied to a corporation. If the situation were reversed, the absurdity would be patent. A law which granted to a corporation the right and denied it to a natural person would be held arbitrarily discriminative without a moment's hesitation." See, also, Phillips Petroleum Co. v. Smith, 177 Okl. 539, 61 P.2d 184, 107 A.L.R. 858, and notes.

Plaintiff also cites and relies on Herbold v. Atchison, etc., Ry. Co., 117 Cal.App. 430, 4 P.2d 184; Rowland v. Bruton, 125 Cal. App. 697, 14 P.2d 116; Ryan v. Inyo Cerro Gordo Min., etc., Co., 41 Cal.App. 770, 183 P. 250; Thomas v. Placerville G. Q. M. Co., 65 Cal. 600, 4 P. 641, and Waechter v. Atchison, etc., Ry. Co., 10 Cal.App. 70, 101 P. 41. Each may be distinguished on the facts involved in those cases. Nothing we have said is intended to be in conflict with anything said in any one of those cases.

As we have shown above the principles involved in Power Manufacturing Co. v. Saunders, supra, are closely parallel with those involved in the instant case and that case is controlling in this court.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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